Supreme Court of the United States,

OCTOBER TERM, 1901.

MARTHA J. SWERINGEN,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

No. 187.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS.

The petition herein was filed April 16, 1895, against the City of St. Louis and Justin E. Joy, and a summons was then issued and delivered to the sheriff and returned by him duly executed as to both of them. The petition is in the usual form in ejectment to recover possession of a portion of the north Wharf established by City Ordinance No. 5403, approved Aug. 6, 1864, but unopened, unused and unimproved as such. It describes the premises that lie east of two blocks that adjoin said established wharf line on the west, and between said line and the river. The description of so large a tract of land in

the petition was made for the purpose of certainly including whatever plaintiff owned through the alluvion formed to her original lots, and the controversy herein is confined to a strip of land 90 feet wide by about 350 or 360 feet long, extending from said Western line of said established wharf (which is also the Eastern line of City Block 2544), to the river. Said strip is a part of the alluvion formed to three lots, owned by plaintiff, each 30 feet wide, being Nos. 33, 34 and 35, on plat C. p. 74 of record, which lots then fronted on the river and were subsequently extended Eastwardly by accretions about 1800 feet to the present low water of the river, and they now run through City Blocks Nos. 308 E, 660 W, 660, 660 E and 2544, and said established wharf. They are shown as they now exist on plat No. 1, p. 96 of record, with a green border and marked Mrs. Martha J. Sweringen. The premises in controversy are crossed by a railroad track marked Chicago, Burlington and Quincy R. R., by what authority if any, does not appear.

Defendant Justin E. Joy, answered by general denial, and the answer of defendant City is a general denial and a plea of adverse possession by it of the premises sued for, for ten years previous to the commencement of the suit, and user as a public wharf by it for the same period with the acquiescence of plaintiff. Estoppel was not pleaded in the answer.

Plaintiff replied to the latter answer by a general denial; record, pp. 4-6.

A jury was waived and the case was tried before the Circuit Court for the City of St. Louis, beginning March 17, 1896; rec. p. 8.

The plaintiff offered in evidence a United States patent dated March 25, 1852, to Louis Labeaume or his legal representatives. Defendant objected to it as irrelevant and immaterial, not showing plaintiff was a riparian owner, which objection the court overruled and defendant duly excepted; Rec. p. 13.

Plaintiff read said patent in evidence, the material parts of which are as follows:

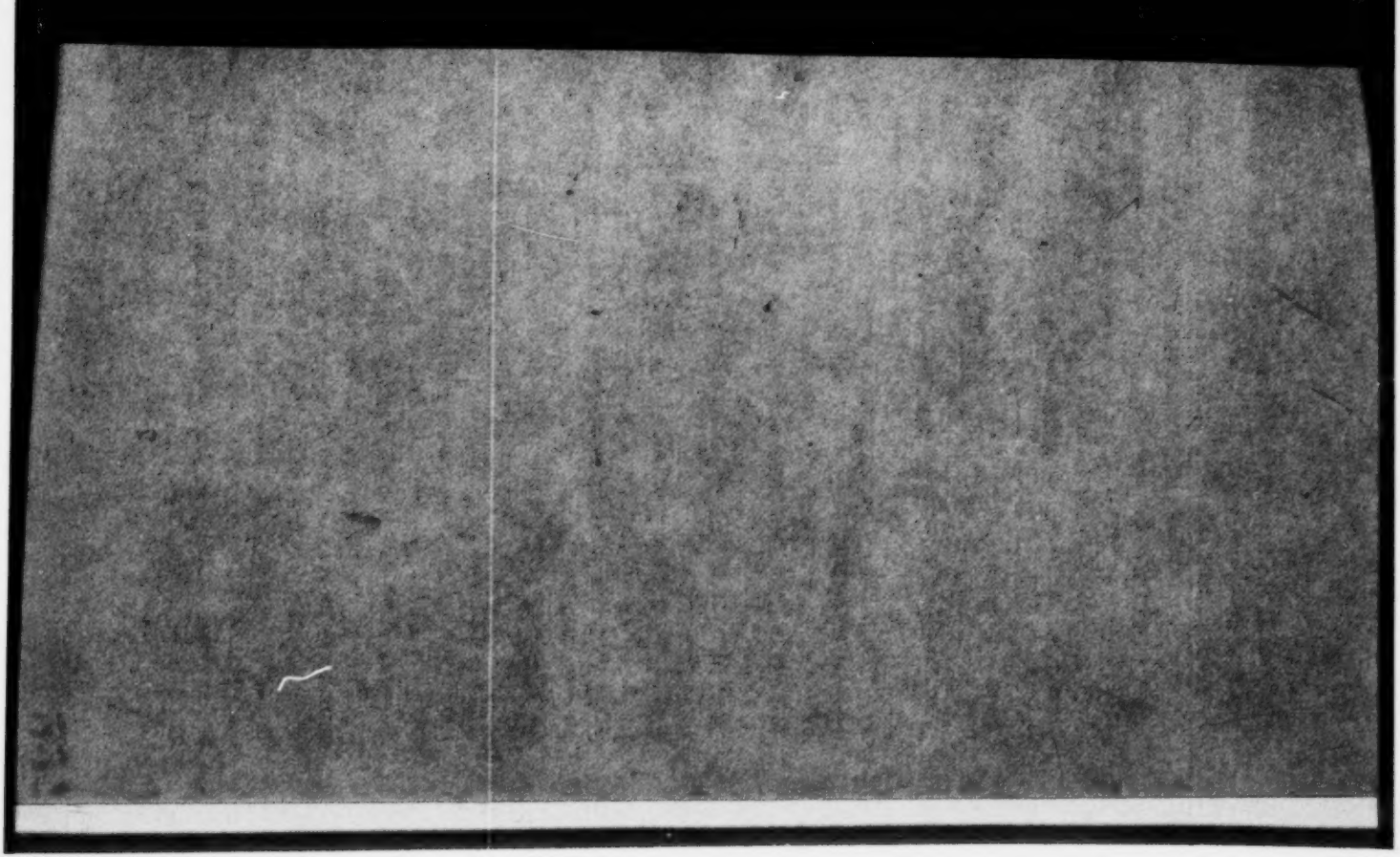
"The United States of America, To all to whom these presents shall come—Greeting:

Whereas, there has been deposited in the General Land Office a *Patent Certificate* number one thousand two hundred and forty-nine of the Recorder of Land Titles, at St. Louis, Missouri, whereby it appears that on the fifteenth day of February, one thousand seven hundred and ninety-nine, Zenon Trudeau, Lieutenant Governor of the Spanish province of Upper Louisiana, made a concession of about three hundred and sixty arpens of land to Louis Labeaume, and that on the second day of March, of the same year, it was surveyed by Antoine Soulard, Surveyor of the same province, to the amount of three hundred and seventy-four arpens, situated three miles north of the town of St. Louis; and that the Board of Commissioners, appointed in pursuance of the fifth Section of the Act of Congress, approved the second day of March, one thousand eight hundred and five, entitled "An Act for the ascertaining and adjusting the titles and claims to land, within the Territory of Orleans, and the District of Louisiana," confirmed on the twenty-second day of September, one thousand eight hundred and ten, three hundred and fifty-six arpens to Louis Labeaume, agreeably to the aforesaid concession, and that on the fourteenth day of June, one thousand eight hundred and eleven, they issued their certificate numbered nine hundred and eighty-two, for that confirmation, under the fourth Section of the Act of Congress, approved the third day of March, one thousand eight hundred and seven, entitled "An Act respecting claims to Land in the Territories of Orleans and Louisiana.

"And whereas, it further appears from the aforesaid Patent Certificate, that pursuant to the decision of the twenty-fifth day of July, one thousand eight hundred and fifty-one, of the Secretary of the Interior, those claiming under Labeaume are entitled to a Patent for the land according to Soulard's survey

and Labeaume's possession; and that the lines of the said Soulard's survey have been retraced, in conformity with the decision referred to, as appears from the Plat, and transcript of Survey, numbered three thousand three hundred and thirty-three, which accompany said Patent Certificate, the said Plat and Transcript Survey having been authenticated by M. Lewis Clark, Surveyor General for Illinois and Missouri, under date twenty-sixth of February, one thousand eight hundred and fifty-two; which said survey number three thousand three hundred and thirty-three contains three hundred and thirty-nine acres, and sixty-eight hundredths of an acre, being situated in Township forty-five north of the base line, of range seven east of the fifth principal meridian, in the State of Missouri, and which is platted and described as follows, to-wit:" record, p. 14.

The plat of said survey 3333, p. 14 of record, shows on its face that the survey contains 21.52 acres more than Soulard's survey contained. By the field-notes its line begins at the s. e. corner of the tract at point A, runs westerly to point B, northerly to point C, easterly to point D; then referring to old corner stone established by Antoine Soulard, found by Joseph C. Brown in 1817 and reestablished by him in 1833, northerly to point E in the old bed of the Rocky Branch, easterly down the old bed of the branch to a point in it, and from the latter, N. 87 degrees 30 minutes east at 5 Chs. and 46 Lks. to point F at the mouth of the Rocky Branch, the n. e. corner of the plat. (The letter F, on this plat, in the printed record, is scarcely legible, but it is plain on the plat in the record filed). Its eastern line is drawn southerly from the latter point and changes its course to vary with the river, four times on the way to point A, the beginning corner. Immediately east of the latter line are two fine lines broken at very short intervals, which indicate small banks made by the water, and east of them is a sand beach, terminating in a rocky beach on the south. This sand-beach is marked Mississippi river in large letters and there is an arrow on it pointed down stream.



East of the sand beach is a cross showing the points of the compass. At the n. e. corner of the plat, point F, there is a dotted line extended over the sand-beach for quite a distance across the river, and also dotted lines showing the former north-easterly and then southeasterly, course of the water from Rocky Branch running through the sand-beach. West of this eastern line on the plat, running southerly, are two etched or dotted lines, the first of which begins west of Second street as laid down on the plat, and the second as far west as Second street, both beginning on the north and running southerly, gradually approaching said eastern line until they intersect each other about two-thirds of the way down the line, there forming a single line which runs on in the same direction and west of said eastern line to the southern line of the plat. There is a pink border on the inside of the plat lines running all around with them. For convenience a blue-print copy of said plat is inserted herein.

The field-notes of the survey follow the plat on p. 15 of the record.

They "begin at a stake set on the *right bank of the Mississippi river between high and low-water mark*" and proceed around the survey as in the plat just described, to a point at the mouth of the Rocky Branch, the north-eastern corner of this survey, and a corner to the City of St. Louis, it being the northern termination of the northwestern boundary line thereof. (The north boundary line of the city is not mentioned.) From this corner, which is marked F, p. 22 of record, (omitting the lengthy and confusing witness calls for points and distances, for the sake of brevity and clearness), "down the *right bank of the Mississippi river, with the meanders thereof, between high and low-water mark*—south 9 degrees e. at 8 chs. and 66 links, a stake,—thence s. 20 degrees e.,—5 chs. and 50 links, a point,—at 10 chs. a post, thence s. 34 degrees e.—at 7 chs. 5 links, the eastern extension of Labeaume's northern ditch, at 25 chs. a stake,—thence s. 23 degrees e.—at 13 chs. and 67 links the northeast corner of Robertson and Patterson's

sawmill,—at 14 chs. and 8 links the southeast corner of said mill,—at 20 chs. and 57 links, the southeast corner of Hendrick's flourmill,—at 23 chs. and 35 links the northeast corner of Cockram's sawmill; 30 chs. and 95 links to the beginning corner."

A witness call to the second distance above which terminates at a "point," is as follows: point, "from which offset north 70 degrees east 1 ch. and 83 links to the center of the water of the Rocky Branch, as running through the sand-beach, —6 chs. and 63 links to the bluff of the sand-beach,—7 chs. and 47 links to the water's edge of the Mississippi river,—return to the meandering line."

On p. 23 of the record, the patent continues as follows:

"The foregoing description of the metes and bounds of said Survey number three thousand three hundred and thirty-three being accompanied, in the said Transcript of Survey, certified on the twenty-sixth day of February, one thousand eight hundred and fifty-two, by Surveyor-General Clark, by "Remarks," and "plat," and "Statement of the interferences," as follows, to wit:

"REMARKS.

"The survey of this tract as made by A. Soulard in March one thousand seven hundred and ninety-nine, and recorded in "Registre d'arpentage" page one hundred and thirty,—a copy of which is attached hereto, represents the area thereof to be three hundred and seventy-four arpens, there being twenty-five arpens and thirty hundredths of an arpen, equal to twenty-one acres, and fifty-two hundredths of an acre less than found by this survey; but as no notes of Soulard's survey describe the meanders of the Mississippi river, and of the Rocky branch, the former bounding the tract on the East, and the latter in part on the North, there are therefore no means to ascertain, whether the difference, or excess, in the area of this survey over that given by Soulard, is owing to a miscalculation

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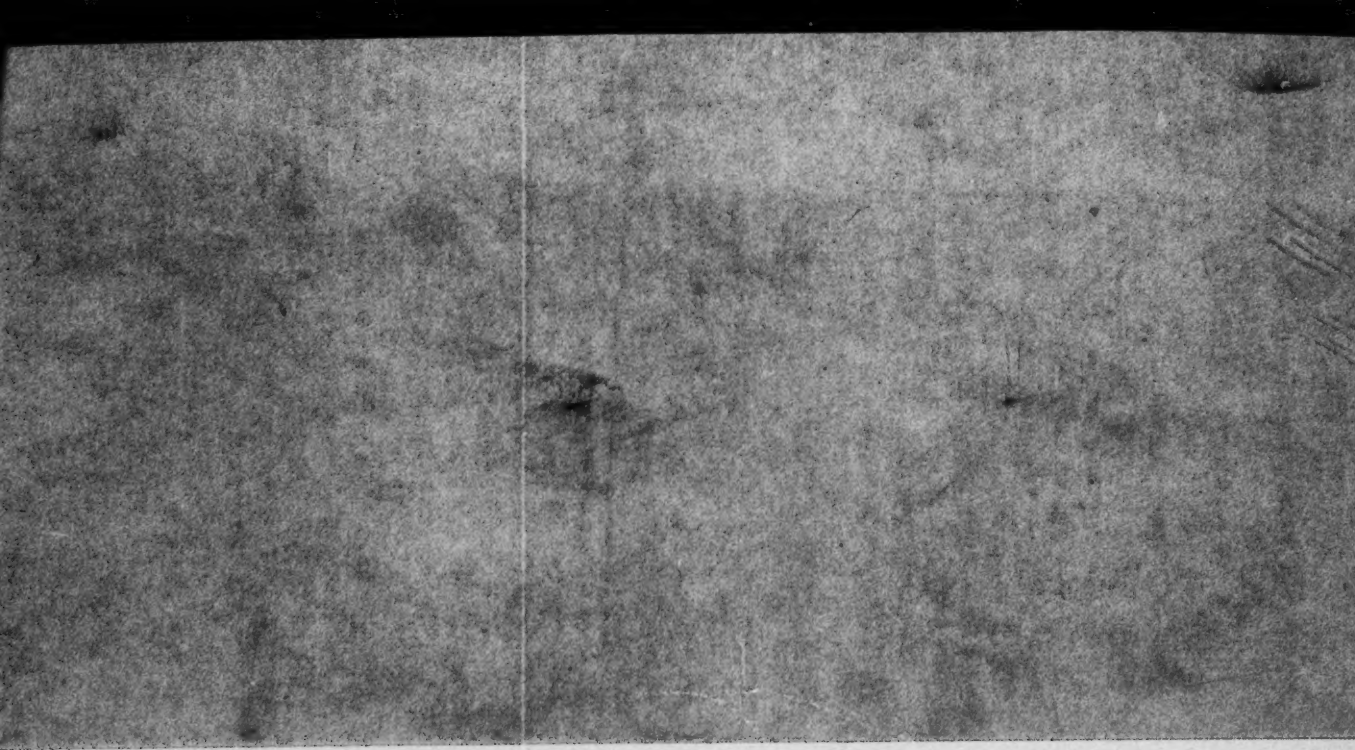

by said Soulard, or to the subsequent accretion along the bank of the Mississippi river, since Soulard's operations. This accretion appears to be rapidly advancing. That portion of the tract eastward of the high bank, shown topographically on the foregoing plat, the top of which is designated by the dotted lines "a-b-c-d-e and f" appears to be the accretion since Soulard's times, and contains about fourteen acres;" record p. 23.

The copyist omitted to mark the dotted or etched lines with the letters a, b, c, d, e and f, but the lines appear plainly on the plat.

Soulard's survey and plat, a blue-print copy of which is inserted herein for convenience, follow the remarks in the patent, on p. 23 of the record, and it is plain to be seen with the naked eye that the eastern boundary of Soulard's survey is the Mississippi river. Then follows a statement of interferences with survey No. 3333, but none of them with these lots, granting clause etc., on pp. 23-25 of record.

The same objection that was made when the patent was offered in evidence was also made, overruled and the ruling excepted to, as each deed in plaintiff's chain of title was offered.

Said Labeaume and wife conveyed said confirmed concession to William Chambers, by deed dated April 27, 1816, recorded July 3, 1816; record p. 26. William Chambers conveyed the undivided two thirds of same to William Christy and Thomas Wright, by deed dated May 4, 1816, recorded July 3, 1816; record p. 28. William Chambers and Thomas Wright and wife conveyed their undivided two thirds of out lots Nos. 1, 4 and 9 of same, as shown on plat, record p. 47, the latter bounded on the North and Northwest by the Rocky branch and East by the Mississippi River, to William Christy, by deed dated March 1, 1830, recorded May 31, 1836; record p. 30. William Christy died intestate, naming his heirs in his will, which was probated in 1837, disposing of a large portion of his property but not said lot 9, which descended to his heirs, except that the share of his grand-daughter, Mrs. Martha

J. Sweringen, plaintiff, as one of his heirs, was reduced one-half by his will; record, p. 35. In the case of Christy et al. vs. Sweringen *et al.*, commenced in 1839, William Christy's heirs partitioned said property and said lot 9 was ordered to be sold; record, pp. 38-69. The Sheriff subdivided said lot 9 into smaller ones (plat record p. 74) and sold them. William Chambers, father of Mary L. Tyler, purchased lots 30, 31 and 32, plaintiff lot 33, Robert Wash lots 34 and 35 and Harriet M. Dean lots 35 and 36, all fronting on the river, between Rocky Branch and Dock street; record, p. 73. The sheriff reported said sale to the Court and the Court confirmed it and ordered conveyances executed accordingly; record, pp. 72-75.

Sheriff William Milburn conveyed said lots 34 and 35, to Robert Wash, by deed dated Dec. 30, 1843; record, p. 76. Robert Wash conveyed the same to John O. F. Farrar and Charles T. Sweringen, trustees for plaintiff, by deed dated Dec. 3, 1850; record, p. 80. Said sheriff conveyed lot 33 to Thomas Morrow and John O. F. Farrar, trustees for plaintiff, by deed dated July 3, 1844; record, p. 82. Said trustees in said deeds were dry trustees of the real estate conveyed. All of the foregoing deeds and partition proceedings bound the property conveyed by them respectively on the East by the River, and said lots, except 30, are each 30 feet wide.

Plaintiff read in evidence tax receipts, 1851-1870, on said lots, bounding them South by Dean and generally North by Tyler, a portion of them bounding them East by the River, others merely giving their depths, and others merely the lots; record pp. 132-150.

For the purpose of locating said lots through the alluvion, plaintiff read in evidence an agreement of adjoining proprietors, establishing a division line through said alluvion. This division line had been accepted as the true line, and acquiesced in by all parties and the public authorities for over twenty years; testimony of Dr. W. M. McPheeters, record, p. 278, and Assessor's plats, pp. 272, 273. Said agreement is as follows:

"It is agreed between Silas Bent and Wm. M. McPheeters that their division line is to be at a point on the west line of Main street, 270 feet north of the north line of Dock street, and said line to run eastwardly parallel with the north line of Dock street to the Mississippi River. St. Louis, April 3, 1873. Mary L. Tyler, by Silas Bent, Sallie B. McPheeters and Mary B. Scott and Julia Crosby, by W. M. McPheeters."

Said agreement is endorsed on a private unrecorded plat, record, p. 10, attached to an abstract of title that was produced on the trial by witness, R. E. Collins, attorney for Mary L. Tyler, and it was retained by him, but he permitted it to be copied. It was not signed by plaintiff, nor any one under whom she claimed title, and it was not in her possession nor under her control, and there is no evidence that she had ever seen or heard of the plat prior to the time of the trial.

The plat extends lots Nos. 30 to 37, both inclusive, directly to the western line (produced northwardly from Dock street, across Buchanan Street) of the established but unopened wharf, and the latter is marked Wharf on it, but no statement of a dedication or that it is a public wharf is made. Mary L. Tyler (heir of William Chambers), owned the lots next north of plaintiff, and Sallie B. McPheeters, Mary B. Scott and Julia Crosby (heirs of George Buchanan), owned property next north of Tyler's. The agreement fixes the division line between them, 270 feet north of Dock street, which makes it 120 feet north of and parallel with the north line of plaintiff's lots (Mary L. Tyler's lots being between plaintiff's and the Buchanan heirs), and said line extends from the former mouth of Rocky Branch (point F), where the alluvion began to form after the Labeaume patent issued, to the Mississippi river. Two other parties, George and Frank S. Buchanan (the remaining heirs of George Buchanan), had lots between the former mouth of Rocky Branch and McPheeters, Scott and Crosby, did not sign this agreement. The heirs whose names are signed to it by McPheeters, knew that they were so signed at the time by him and acquiesced in it, and it has been re-

spected by all of said heirs and the public authorities, ever since; Testimony of R. E. Collins, record, p. 8; Dr. W. M. McPheeters, p. 278; J. V. S. Barret, p. 88; Charles T. Farrar, p. 117; C. F. Liebke, p. 193; defendant's plat, p. 102; Assessor's plats, 1874-1895, pp. 272-295, and will of George Buchanan, p. 158.

When plaintiff's attorneys offered this paper (agreement and plat) in evidence, they were asked by Mr. Allen, counsel for defendant, in the midst of the examination of Mr. Collins, if they would undertake to be bound by it, and they replied, "We will concede that;" record, p. 10.

Said R. E. Collins had been employed as Attorney for Mary L. Tyler for a number of years in putting and keeping squatters off her lots, and was employed by plaintiff's agent to do the same service in regard to her lots, about two years before the trial, which he did, and for that purpose obtained a survey of the central portion of them that extended only from Hall, formerly Kennett Street to the established wharf line. This survey was executed after defendants took possession of the premises in controversy, and is shown on defendant's plat, record, p. 102, colored green. The latter survey is also a private unrecorded one, and there is no evidence that plaintiff had ever seen or heard of it before the trial.

THE TESTIMONY FOR PLAINTIFF is to the effect that from the line marked on the plat, record, p. 96, "line at the time of sale by Milburn, sheriff," East to the river, a distance of about 1800 feet in front of these lots, is alluvion formed by accretions; plat, p. 96 of record, and testimony of Surveyor Joyce, on same page. On this point all of the evidence concurs.

That James T. Sweringen, Husband of plaintiff, looked after and cared for these lots up to the time of his death, which occurred about 1872, and from that time until 1875, a Mr. Barret, and from then on Farrar & Bro. and then Farrar & Tate, as her agents, looked after and cared for the whole of these lots down to the river, driving off squatters that built

shanties on them. Also paid taxes on them for her and retained the tax receipts in their possession. That to December, 1890, there was not the slightest improvement of any kind on the east end of the lots, which constitute the premises sued for, and they were in a state of nature and had a growth of willows on them near the river. That squatters collected in the neighborhood and lived near the river in shanties and old boats, and called the place Little Oklahoma; testimony of J. V. S. Barret, record p. 88; John G. Joyce, p. 95 and Charles T. Farrar, p. 117, and a sketch of the premises in front of p. 97 of record. Plaintiff had a house on her lots just west of these that was projected over on these lots, and another house east of the former and on these lots, occupied by tenants. The latter house had been torn down or taken away before the trial; Testimony of Barret, record p. 88 & Farrar, p. 281.

Plaintiff never made any plat, nor did her trustees, dividing or dedicating any portion of these lots for street or wharf, or any other purpose. City Blocks were laid out on them on a plat made by the Street Department of the City prior to 1875, which was subsequently adopted in the Assessor's Office (following the Buchanan partition plat, record, p. 170, of 1866, except next the river). The formation of alluvion was swampy as it was made and remained so for a long time, and it was formed to the present low water mark of the river prior to 1875; Assessor's plats, record, pp. 272-273, and testimony of John G. Joyce, pp. 95, 111. A blank space is left on these latter plats between block 2544 and the river, on some of which it is marked wharf. The last named plats are City plats, read in evidence by defendant, and also plat, record, p. 102, all of which locate plaintiff's lots as she locates them. In about 1870 the city constructed Rocky Branch sewer under Branch Street, and Rocky Branch was filled up here; testimony of J. G. Joyce, record, pp. 95, 115. About 1891 defendant Joy and the railroad began to occupy the premises in controversy, and prior to that time neither plaintiff's agent nor her grandson had ever heard of any adverse claim to or interference with

them; testimony of J. V. S. Barret, record, p. 88, and Charles T. Farrar, p. 117.

The value of the rents of the property in controversy exceeded $100.00 per month for five years prior to the trial of the case; testimony of Charles T. Farrar, record, pp. 117 & 125, and John H. Terry, p. 126.

All of the trustees of plaintiff named in the deeds for this property died years before the commencement of this suit, (testimony of J. V. S. Barret, record, p. 88) and none of them ever had any interest in it except the bare legal title and they were what are termed dry trustees.

THE EVIDENCE FOR DEFENDANT is to the effect that on May 1, 1826, a patent was issued to Rufus Easton for U. S. survey No. 2042, which it read in evidence, record p. 275, the description in which calls for the Rocky Branch, "thence meandering down the branch, east six chains, north thirteen chains, north fifty-three degrees forty-five minutes, east eight chains and fifty links to a point at the mouth of the branch, thence up the Mississippi River." Among the many interferences laid out on the plat of U. S. survey No. 3333, plat, record, p. 14, there is none of survey 2042 (or any other) with these premises, and surveys Nos. 3333 and 2042, merely adjoin each other on the latter plat. George Buchanan, by mesne conveyances, acquired that portion of survey 2042 lying north of Rocky Branch and the Labeaume survey, in 1842; record, pp. 152-157. Defendant on the trial claimed this as an outstanding title to the premises sued for, in George Buchanan's heirs.

The whole of this Buchanan title was admitted against the objection of plaintiff that it was irrelevant.

In 1852, George Buchanan laid out a plat of Bremen, record, p. 190, dividing his land west of the river bank into blocks and lots, marking in red the part he claimed to own and leaving a street along the river bank to Rocky Branch, and the remainder of it east he merely shaded pink. The pink shading

extends south to the water flowing from Rocky Branch and east from the mouth of the branch and along it to where the branch turns southwardly. It does not follow the branch from here but extends eastwardly along or near the north city boundary line. The part shaded pink extends east less than one block from the mouth of Rocky Branch, and no doubt represents the sand beach shown in the plat of the Labeaume patent on p. 14 of the record. Streets were laid out and dedicated on it, but no wharf. There was no interference on this plat with any of plaintiff's lots, and little, if any, with the Tyler lots (which laid between Buchanans and plaintiffs) near the old river bank at the former mouth of Rocky Branch.

July 24, 1857, the executors of George Buchanan, deceased, who held the legal title to his real estate as trustees under his will, record, p. 158, executed a lease to Christian E. Letzig, Carl H. Schrage and Christian Liebke, for nine years and five months, for that portion of the land embraced in said plat lying east of Second Street as laid down on it, to the river, record, p. 167. Under this lease they occupied from Buchanan Street south to Rocky Branch as far as the Buchanan title went, claiming nothing more than the Buchanan title under said lease; testimony of Liebke, record, pp. 190, 200. They had a saw mill near Second and Buchanan Streets, which they operated, buying logs that had been rafted down the river and landed in or near the bend of the river there, where an eddy was formed, and then drew them up to firm land for use. Rafts, barges and steamboats landed in and near said bend in the river, as occasion or business required; testimony of C. F. Liebke, record, p. 190; James M. Montgomery, p. 205; John H. McBride, 210.

At the expiration of this lease by the executors, the five Buchanan heirs partitioned this land, laying it off into blocks, with streets and alleys (but no wharf or street or alley next the river), bounding it on the south by Rocky Branch. Rocky Branch began at that time to interfere with these lots a little east of the west line of the city block 660, crossed them diagonally in a southeasterly direction and emptied into the

river a little south of Dock street, which it crossed; Partition plat, record, p. 170, and defendant's larger plat, p. 102. The former plat does not include any portion of the premises sued for in this action, which are shown by both of said plats to have been and were then under the river. The lots on the partition plat along the northern side also interfere with the Tyler property on the north. These interfering lots were assigned respectively, by the partition, beginning at the river and going west, to Mary B. Scott, George Buchanan, Sallie B. McPheeters, Julia Crosby again, F. S. Buchanan and George Buchanan again, the last and most western lot. Said plat has on it a dotted line about 30 feet south of said agreed line between Tyler and Buchanan heirs, and the four lots immediately north of the agreed line, beginning at the river and going west were assigned to Julia Crosby, one of the Buchanan heirs.

After this partition, Christian Liebke rented from all of these Buchanan heirs, except George Buchanan, and occupied portions of these interfering lots, to the time in 1873, of said agreed line, and after that time to said line by hauling and placing logs on them, excepting the George Buchanan portion. The latter was unoccupied. The testimony of Mr. Liebke, the only witness to this occupation, shows clearly that it was not under a claim of ownership if not owned by the Buchanans, and not continuous, as logs received during the rafting season were removed for use, leaving the land vacant, and that he did not intend to occupy or claim any land the title to which did not belong to the Buchanan heirs. That he did not in fact either occupy intentionally, or claim any portion of the property in controversy, although he might occasionally have drawn logs over it; Liebke's testimony, record, pp. 190-204.

The water flowing through the sand beach from Rocky Branch, when the river was not over the beach, changed its course with every high stage of the river, and no two of the various plats made at different times locate it at the same place, and there is no evidence that any alluvion ever formed to its banks by accretion.

In 1845 there was enacted a law (Laws Mo., 1844-45, p. 90) authorizing the city to construct works, either within or without the city, to improve and secure the harbor and remove obstructions to navigation. In about 1858 a spur dike extending out into the river, located at least one and a half blocks north of this property, was constructed by the city, and a second one near, later; testimony of Liebke, record, p. 190; James Montgomery, p. 205. In about 1864, the city began the construction of a longitudinal dike about one thousand feet out in the river in front of these lots, made of stone thrown into the water from barges until they reached about low water in the river. It was several years before the latter dike was completed, and it connected with said spur-dike up north and extended south to about the point of the bend in the river below. The effect of it was to impede the current and leave pools and sediment after every high water, between it and the river bank, and alluvion continued to form more rapidly to this property, and the dike is now along its eastern edge and is at low water mark of the river; testimony of John G. Joyce, record, p. 95, Herman Richtien, 214, and Julius Moulton, 216.

The land in controversy was never a wharf, nor was it ever used as a wharf by defendant or the public, but an ordinance was passed, approved August 6, 1864, to establish and open a wharf from the south side of Biddle Street to the northern boundary of the city, which then extended north to Ferry Street, fixing definitely by metes and monuments its western line, which crosses plaintiff's lots about 350 feet west of the present low water mark of the river; City Ordinance No. 5403, record, p. 222. By it the Land Commissioner was authorized and instructed to cause the wharf as established to be opened according to law. He did not open it and no wharf has ever been constructed, nor any improvements in the nature of a wharf ever made by the city, over the property in controversy, or along or north of the block in front of which it is situate. All of the evidence for both plaintiff and defendant established these facts. Julius Moulton, City Engineer, ran out this western

wharf line about 1883 or 1884, and placed stones along it where it forms the western line of the property sued for; record, p. 216.

The City began proceedings to open Kennett, now Hall Street, in 1870, record, pp. 234-260, but there was no legal service of process on the plaintiff and no attempt to serve any either on her husband or her trustees. The return of the marshal as to service on her is as follows: "Also by leaving a true copy of the same this 18th day of July, 1870, at the usual place of abode of the within named defendants, Henry Overstolz and Martha Sweringen, with a member of their family over the age of fifteen years;" record, p. 237. The verdict in the case is not signed by any of the jury, record, pp. 248-260, each of whom were required by Sec. 3, Art. 8, of the Charter, Laws Mo. 1870, p. 479, to sign it, and no judgment was rendered on it by the Land Commissioner as required by section 6 of article 2, of the Ordinance under which he was acting, record, p. 227. The plat of the benefit district in the case, made by the Street Department and certified by the City Engineer, June 1, 1870, record in front of p. 261, shows City Block 2544 (the east line of which is the same as the western line of said established wharf), and a street and part of Block 660E, out in the river at that time and east of the benefit district. The premises in controversy are east of City Block 2544, which block was then unformed, and these premises are still further out on it in the bed of the river under water. In designating owners of property north of Rocky Branch, it follows the Buchanan partition plat on p. 170 of the record. This benefit district plat was made prior to June 1, 1870, nearly and possibly more than three years prior to the agreed line of April 3, 1873, between Tyler and Buchanan, and it locates Tyler's lots through the alluvion, south of Rocky Branch, so as to cover plaintiff's and Dean's lots, in part.

Said verdict purported to assess benefits against plaintiff, for the collection of which an attempted sale under an execution

that referred to a judgment as having been rendered on said verdict, was made and deed executed to the city, in 1871, by the City Marshal, for a lot of ground in City Block No. 308E, 90 feet front by 224 feet 11 inches deep, described in such manner that it can not be located, bounding it front on ——— Street, north by Tyler street, there being no such street there, east by ———, South by Dean, west by Sweringen et al., record, p. 260. The City executed a deed back to her, by the same description in 1879; record, p. 265.

Said street opening proceeding and deed were read in evidence against repeated objections by counsel for plaintiff.

After the line agreed upon between Tyler and Buchanans, April 3, 1873, and land had formed east into or through Block 2544, the Assessor's office in 1874, adopted said Street Department plat and Block numbers and began to assess the property by extending the lines of all of the lots between Buchanan and Dock Streets, directly through the alluvion numbered in Blocks as aforesaid, omitting streets, to the east line of Block 2544, but did not attach any Nos. to the lots as extended through the new blocks, but assessed them by giving as boundaries the adjoining lots on the north and south in the names of their respective owners. This is still the case. See Assessor's plats, 1874-1895, record, pp. 272-273, read in evidence by defendant. On some of these plats the space between Block 2544 and the river is marked wharf, and the authorities either failed to, from its formation, or quit assessing it and have not assessed it since the Street Department plat was adopted in 1874. The Clerk in the Assessor's Office made out the tax bills accordingly on the remainder of plaintiff's lots, bounding the portion of them through Block 2544, East by Wharf, as shown by said tax bills, Testimony of Ernst Boedicker; record, pp. 270-274.

There is no return of any of plaintiff's lots for assessment, either by or for her, in evidence. No wharfage appears to have been either collected or demanded of river craft at or near these premises.

Defendant read in evidence said tax bills receipted for the years 1875-1895, except for the year 1893; record, pp. 276-277. Most of them are on a large amount of plaintiff's property in addition to said lots 33, 34 and 35, and include the whole of the latter running through Blocks 308 E, 660 W, 660, 660 E, and 2544, and bounds them south by Dean, and north by Tyler the same as in all of the plats of them since April, 1873, the time of the agreed line.

Defendant also read in evidence the plats, record, p. 102, containing the field notes of surveyor Joyce in the vicinity of this property. These field notes are the result of his investigations and surveys, as he testified; record, p. 102. The plat locates plaintiff's lots marked green, and Mary L. Tyler's marked red, down to the established wharf line, just as they are located on plaintiff's plat to that line, record, p. 96, It also shows the agreed line of April, 1873, and the Buchanan partition plat.

Also read a lease from the City of St. Louis to Justin E. Joy, pursuant to City Ordinance No. 16161 entitled: "An ordinance to lease to Justin E. Joy a portion of the unimproved wharf at and north of the foot of Dock Street," approved April 19, 1891, that authorized such leasing of a portion of unimproved wharf to him for a period of fifteen years from the date of approval of said ordinance, at an annual rental of six hundred dollars for the first five years, $1,200 for the second and $1,800 for the third five years, to be used by him for the purpose of landing, hauling and storing lumber thereon. The property so leased embraced 152,000 square feet, including the premises in controversy, lying east of the C. B. & Q. R. R. track; record, pp. 267-270. About the same time the Chicago, Burlington & Quincy R. R. Co. began to occupy a strip about 40 feet wide and 11 feet east of said wharf line, for a track, across these lots.

Down to this time, aside from a few transient squatters, that were put off from time to time, these lots from First or Main Street to the river, remained in a wild or natural state,

overgrown with willows and underbrush as far west as Hall, fomerly Kennett Street, from the river beach towards the houses of defendant on the west end of them; testimony of J. V. S. Barret, record, p. 88, John G. Joyce, p. 95; Charles T. Farrar, p. 117; Julius Moulton, p. 216.

DEFENDANT HERE RESTED and asked but one instruction which is in the nature of a demurrer to the whole evidence, which the court refused and defendant duly excepted; record, p. 283.

The court then gave the following instructions for plaintiff, to which defendant objected and duly excepted.

The court declares the law to be that the conveyances read in evidence by plaintiff, vested the legal title to lots numbers, thirty-three, thirty-four and thirty-five, described in a portion of said conveyances, in the trustees of Martha J. Sweringen and constituted the owners thereof, riparian proprietors.

The court further declares the law to be, that any addition made to the land described in the deeds read in evidence by plaintiff, to Martha J. Sweringen's trustees, by gradual or imperceptible deposits from the Mississippi river is to be taken and considered, as the same formed, as a portion of the land described in said deeds, notwithstanding the fact that such addition of land may have been aided or caused by a dyke or dykes built in said river by the city of St. Louis.

The court declares the law to be, that the deed from the city to Martha J. Sweringen, offered in evidence, does not estop plaintiff from maintaining this action, if she can otherwise maintain it.

The court further declares the law to be, that although plaintiff may have known that a railroad was being built across the premises sued for, and failed to object to or protest against the building of the same, that such failure did not deprive her of any right she may otherwise have had to maintain this action.

The court further declares the law to be, that the acts and conduct of the respective parties hereto, are insufficient to estab-

lish an estoppel *in pais* against the plaintiff, or to deprive her of any right she may otherwise have had to maintain this action.

The court further declares the law to be, that although plaintiff may have failed to pay taxes for a number of years on the premises sued for, that such failure did not deprive her of any right she may otherwise have had to maintain this action.

The court further declares the law to be that in order to find that the owner of any part of the premises sued for, dedicated the same for the purpose of a wharf or street, by matter *in pais*, the proof that the owner intended and consented to make such dedication should be so full and persuasive as to leave no reasonable doubt of such intent and consent, and the acts of such owner relied on to establish such intent and consent must be irreconcilable witth any construction, except such intent and consent.

The court further declares the law to be, that the evidence is insufficient to show that any portion of the premises sued for were dedicated for a wharf or street; record, p. 283.

A jury having been waived, the court took the case under advisement and rendered a verdict or finding for plaintiff, as follows:

Martha J. Sweringen,
vs. No. 99865.
City of St. Louis and Justin E. Joy.

The court declares the law to be that under the pleadings and evidence the plaintiff is entitled to judgment for the possession of the following described premises, situated in the city of St. Louis and State of Missouri, and bounded as follows: On the east by the Mississippi river; on the west by a line coincident with the alleged western boundary of the wharf, as set forth in Ordinance 5403, which line is 90 feet and 9 1-4 inches in length along northwardly with said alleged wharf line, and commences at a point 60 feet and 6 1-4 inches north of the intersection of the north line of Dock street, with said alleged

wharf line; on the south by a line parallel to the north line of Dock street produced to the river, and 60 feet and 6 1-4 inches north of the same; and on the north by a line parallel to the south line, and 90 feet therefrom; and the plaintiff is also entitled to judgment against the city of St. Louis for $5,000 damages for the detention of said property during the five years preceding the date of this judgment and the plaintiff is also entitled to have the value of the monthly rents and profits established at $100; record, p. 284.

Said verdict or finding was on December 2, 1896, and on the same day the court rendered judgment in favor of plaintiff for possession of the premises, damages and monthly rents as therein found, with costs, and ordered execution and a writ of possession for the same; record, p. 285.

On December 3, 1896, the City of St. Louis, defendant, filed a motion for a new trial, which was overruled by the Court and all the necessary steps were taken by it to secure an appeal to and review of the case by the Supreme Court of the State of Missouri and an appeal was granted to it to said Supreme Court. No appeal was taken or asked for by or in behalf of defendant Justin E. Joy; record pp. 7 and 289.

The cause was argued and submitted in said Supreme Court, and on June 15, 1899, it rendered a judgment therein and reversed the judgment of said Circuit Court for the City of St. Louis, for plaintiff, and rendered a judgment for defendant; record, p. 290. The opinion filed in said Supreme Court, record, p. 291, makes a statement of facts (containing some misapprehensions of what the record shows), and the objections made to the introduction of the Labeaume patent in evidence in the court below, by the defendant, to the effect that it did not vest riparian rights, and then sums up the points on which the case is determined, as follows:

"It is fundamental in the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase.

* * * * * * * *

"Now in the patent to Lebeaume, the river is not mentioned as a boundary. On the contrary, the eastern boundary is a permanent line, fixed by courses and distances, metes and monuments, "between high and low water mark;" and the accompanying survey exhibits a tract of fourteen acres or more between the eastern boundary and the river itself."

The latter statement is assumed to be true in the opinion, in direct conflict with the statement in the "Remarks" in the patent, record, p. 23, that these 14 acres are a portion of U. S. Survey No. 3333, and aid in making its excess of 21.52 acres over the area of Soulard's survey.

"Whatever may have been the original Spanish concession, the survey and patent made under the confirmation, in 1852, must control as to the extent of Labeaume's right.

* * * * * * * *

"Our conclusion is that as Labeaume was not a riparian owner, his heirs or grantees can not recover the tract in suit as an accretion. The court therefore erred in admitting the patent as any evidence of title to the land in suit, as it did not purport to convey it to Labeaume.

"Plaintiff, then, having no paper title to the land in suit, is remitted to an actual, continuous adverse possession of the tract as her basis of recovery. She has no color of title by which her possession of a part can extend to the whole."

The latter ruling results from the misconstruction of the patent as a necessary consequence, for if the patent vested in her riparian rights, she then had the legal title which carried with it the constructive possession.

The opinion then states facts bearing on such adverse possession, beginning with those considered as tending to negative the same by plaintiff (also containing misapprehensions of what the record shows), but instead of deciding the case on them, it shows specifically that no such decision was either made, or intended to have been made, by the concluding statement on the question on p. 296 of record, as follows:

"So much for the negative aspect of her adverse possession."

It then states the affirmative proof for plaintiff in regard to her actual possession of part of her lots, but not extending to or over the premises in controversy, and it then concludes:

"It follows that plaintiff introduced no evidence to show possession or seizin of the tract sued, *within* (should be, for) ten years before the commencement of her action, and the Circuit Court erred in not so holding, as plaintiff had no paper title drawing to her the possession.

"In view of this conclusion, we do not deem it necessary to enter into a discussion of various other incidental questions which arose in the case.

"In our opinion, there was no evidence to sustain the judgment of the Court, and it is accordingly reversed;" record, pp. 282-297.

A motion for a rehearing was filed in the case by the plaintiff, based on what she claimed to be a misconstruction of said patent, which the Court denied on July 3, 1899, record pp. 297-301. Plaintiff's counsel did not state in specific words in said motion that there was a federal question in the case.

October 3, 1900, a writ of error was issued from this Court to the Supreme Court of the State of Missouri, in this case, and a citation issued and service of same acknowledged October 4, 1900. Said writ of error was duly returned by the Clerk of the latter Court, the case docketed and the record filed with the Clerk of this Court, October 31, 1900; record, pp. 2, 3, 304.

The errors assigned herein and prayer for reversal, are as follows:

1. The Court erred in said cause in deciding that the Court below erred in admitting the patent to Louis Labeaume or his legal representatives in evidence, as any evidence of title to the land in suit in said cause.

2. The Court erred in said cause in construing the United States patent to Louis Labeaume and in deciding that the patent to Louis Labeaume or his legal representatives did not purport

to convey the land in suit in said cause.

3. The Court erred in said cause in deciding that said Louis Labeaume was not a riparian owner and that his heirs or grantees could not recover the tract of land in suit as an accretion, in said cause.

4. The court erred in said cause in deciding that the plaintiff in error had no paper title to the land in suit in said cause.

5. The court erred in said cause in deciding that the court below erred in overruling the objections of defendants to the patent of Louis Labeaume, or his legal representatives, as irrelevant and immaterial and not tending to support the issue in said cause, and not showing the plaintiff was a riparian owner, and admitting said patent in evidence in said cause.

6. The court erred in said cause in deciding that there was no evidence to sustain the judgment of the court below, in said cause.

7. The court erred in said cause in reversing the judgment of the court below in said cause.

8. The court erred in said cause in rendering judgment in favor of the defendants in said cause.

WHEREFORE, the said plaintiff in error prays the Honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of the State of Missouri entered in the above entitled cause, and for an affirmance of the judgment of the court below—the Circuit Court of the City of St. Louis, Missouri, in said cause; record, pp. 1 and 302.

The foregoing statement is of the whole case. We have nothing to add to the brief of plaintiff in error, on the motion to dismiss or affirm, now on file, and shall not repeat what is said in it except so far as it may have a bearing on the remaining questions on the merits of the case not therein presented.

POINTS AND AUTHORITIES.

1. The first questions requiring consideration after the one of jurisdiction, heretofore presented, are the validity and proper construction of said patent to Louis Labeaume or his legal representatives, in regard to whether it bounded the land granted by the Mississippi River, and vested riparian ownership in said grantees, and the alluvion formed to the bank of said river in front of the land granted, by accretions, as claimed by plaintiff, and if not, was the legal title to the remainder of the land so confirmed, granted to said legal representatives of said Labeaume, by an Act of Congress approved June 6, 1874, and the title and ownership of said alluvion thereby vested in them?

The first section of said Act of Congress is as follows:

"That all of the right, title and interest of the United States in and to all the lands in the State of Missouri, which have at any time heretofore been confirmed to any person or persons by any Act of Congress, or by any officer or officers, or board or boards of commissioners, acting under and by authority of any Act of Congress, shall be, and the same are hereby granted, released and relinquished by the United States, in fee simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and completely in every respect whatever, as could be done by patents issued therefor according to law;" 18 U. S. Stats. at Large, p. 62.

A verdict was rendered in favor of plaintiff, and judgment was entered thereon, for possession and damages. Defendant appealed to the Supreme Court of Missouri, which reversed said judgment and rendered a judgment in favor of defendant, deciding that the land granted to Louis Lebeaume was not bounded on the east by the Mississippi River; that the court below erred in overruling the objection of defendant to the introduction of said patent in evidence; that Lebeaume was

not a riparian owner, and that, therefore, the plaintiff in error, as his grantee, could not recover the land in suit as an accretion.

These rulings constitute the substance of the errors assigned herein in various forms.

2. The recitals, plats and statements in the patent to Louis Labeaume or his legal representatives, show that U. S. Survey No. 3333, was a mere retracing of Antoine Soulard's Survey of the Spanish concession to him, which survey is also embraced in the patent and discloses to the naked eye that it was bounded on the east by the Mississippi River, and said river continued to be its eastern boundary as alluvion formed thereto; see authorities cited in point 7 herein. The remarks in the patent state that the tract was bounded on the east by the Mississippi river, and that accretions had formed to it since Soulard's operations to the extent of about fourteen acres, which are included in said survey No. 3333, and the further statement made that they were then rapidly advancing. These recitals and remarks evidence the intention of the United States to fix the eastern line of survey No. 3333, as the Mississippi river, recognize its boundary as such, and entitle the patentees to all alluvion then formed and such as was forming and to be formed, to Soulard's Survey; King v. St. Louis, Mem. of Judge Adams, in U. S. Ct. Ct., East. Div. East. Judicial Dist. of Mo., filed May 16, 1900, unreported but a copy of same is on file herein and printed in defendant's motion to dismiss or affirm, 46-50; West v. Cochran, 17 How. 58 U. S. 403, 410; Maguire v. Tyler, 8 Wall. 75 U. S. 650, 655; Tyler v. Wells, 2 Mo. App. 526, affirmed, 70 Mo. 33; all decisions on this patent. See also, Presnell v. Hadley, 141 Mo. 187, 191-194; Walton v. Drumtra, 152 Mo. 489, 497; Johnson v. Bowlware, 149 Mo. 451, 456; Carter v. Foster, 145 Mo. 383, 392; West v. Bretelle, 115 Mo. 653, 658, holding that the intention of the parties is to be ascertained by considering all of the provisions of the deed, as well as the situation of the parties thereto. Besides, this call for the river controls courses, distances and quantity, and the corners, monuments and meander lines of a

survey; Gould on Waters, sec. 194.

3. This call for Soulard's survey in the patent made that survey not only a monument, but the chief monument called for in it, and if there were any calls in U. S. Survey No. 3333, inconsistent with Soulard's survey, they should be rejected even though such call be, or the plat of the former survey show it to be, a monument also, and the true description held to be Soulard's survey; Rutherford v. Tracy, 48 Mo. 325, 326; Jamison v. Fopiana, 48 Mo. 194; Cooley v. Warren, 53 Mo. 166, 167; West v. Bretelle, 115 Mo. 653, 660; Simpson v. Railroad, 145 Mo. 64, 79; Johnson v. Bowlware, 149 Mo. 451, 456.

4. A grant by the United States bounded on a navigable river, either above or below tide-water, extends only to high-water mark. The land between high and low-water marks belongs to the State and may either be retained by the State or conceded to the riparian owner, and the United States can not sell it, except perhaps for public purposes; Barney v. Keokuk, 94 U. S. 324, 337; Packer v. Bird, 137 U. S. 661, 671; Hardin v. Jordan, 140 U. S. 371, 382; Shivley v. Bowlby, 152 U. S. 1, 27. But the right to alluvion does not depend on the ownership of the land between high and low-water mark; ownership to the former line, or bank, which is the same, vests this right; Shively v. Bowlby, 152 U. S., 1, 35; Lovingston v. St. Clair County, 64 Ill. 56; St. Clair County v. Lovingston, 23 Wall. (90 U. S.) 46, 68; Meyers v. St. Louis, 8 Mo. App. 266, 272. In Missouri, a riparian proprietor owns to low-water mark; Shively v. Bowlby, 152 U. S. 1, 35; Cooley v. Golden, 117 Mo. 33, 43-48; Railroad v. Union Stock Yards, 120 Mo. 541, 552; Hahn v. Dawson, 134 Mo. 581, 591; McBain v. Johnson, 155 Mo. 191, 201; Moore v. Farmer, 156 Mo. 33, 47.

5. The bank of a river is coincident with the edge of the water of the river at its fullest, or high-water mark; Houck on Rivers, sec. 8; Gould on Waters, sec. 45; 3 Am. and Eng. Ency. of Law, 784, 2d Ed.; Angell on Water Courses, sec. 4, n. 4. The bed is covered by the river, and the bank is that part

of the bed lying between the top of the bank or high-water mark, and where water actually flows, and it is part of the river bed; Houck on Rivers, secs. 6, 7, 8, 9, 10 and 183; Angell on Water Courses, sec. 4,n. 4; Gould on Waters, sec. 45; 3 Am. and Eng. Ency. of Law, 784 and 905, 2d Ed. And a call for the water of a river, the bank or shore of a river, by, with, along or on a river or its margin or its high-water mark; a corner at, in or near a river or its bank to another such call; or for a river bank, or from one point to another on a river bank, are legally synonymous terms, and are variations of a call for a river when used in grants, and so bounds them; Gould on Waters, sec. 197; County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 64 and 65; Howard v. Ingersoll, 13 How. (54 U.S.) 381, 422; St. Louis v. Rutz, 138 U. S. 226, 243; Packer v. Bird, 137 U. S. 661, 666-668; Labeau v. Gaven, 37 Mo. 556, 557-558.

"The bank and water are correlative. You can not own one without touching the other;" Starr v. Child, 20 Wend. 149, 152; Angell on Water Courses, sec. 26.

6. The word riparian comes from Latin *ripa*, a river bank, and denotes such rights as follow or are connected with the ownership of the bank; Gould on Waters, sec. 148; and where the concession, confirmation and survey distinctly called for the bank of the Mississippi river as the eastern boundary of the land granted and confirmed, it was held sufficient to carry all accretions made thereon since the origin of the title, beyond a doubt; Labeau v. Gaven, 37 Mo. 556, 557-558. The survey fixes the east line in the patent on the right bank of the river between high and lowwater mark, a point beyond which the United States would not ordinarily convey, and beyond the bank and in the river bed, and further than the law requires for that purpose, so that necessarily the patent vested a right to the alluvion. Besides, ownership to the bank vests such right. One person may own the bank, or to the bank, and another the bed of a river, and the former will own the alluvion formed to the bank; Hindson v. Ashby, 1 Ch. L. R., 1896, 78, 82; Dunlap

v. Stetson, 4 Mason 349, 366; Child v. Starr, 4 Hill (N. Y.) 369, 376.

7. Grants of land by the United States bounded on streams and other waters, made without restriction or reservation, are construed most favorably to the grantees, and that all lands that might have passed by them actually passed; Grand Rapids & Ind. Rd. Co. v. Butler, 159 U. S. 87, 89-91; Gould on Waters, secs. 195, 196, 197; Angell on Water Courses, sec. 23. And a grant by the United States of land bounded by navigable waters, which boundary we have seen is necessarily high-water mark, vests in the grantee and those deriving title from him, all alluvion formed to such grant, and the alluvion formed by accretions to said patent, or the grant by said act of Congress, became a portion of the land granted as fast as it was formed and was vested thereby in said Lebeaume or his legal representatives in the same manner that the owner of a tree is vested with the title to its fruit; Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 213.

In New Orleans v. United States, 10 Pet. (35 U. S.) 662, 717, the court said:

"The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil;" Jefferis v. East Omaha Land Co., 134 U. S. 178, 189-196; Schools v. Risley, 10 Wall. (77 U. S.) 91, 110; County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 68; Jones v. Johnston, 18 How. (59 U. S.) 150, 155; Jones v. Soulard, 24 How. (65 U. S.) 41, 63; Banks v. Ogden, 2 Wall. (69 U. S.) 57, 67; St. Louis v. Rutz, 138 U. S. 226, 241, 245; Saulet v. Shepherd, 4 Wall. (71 U. S.) 502, 508; Nebraska v. Iowa, 143 U. S. 359, 360; Campbell v. Laclede Gas Light Co., 84 Mo. 352, 372; Benne v. Miller, 149 Mo. 228, 238; Gorton v. Rice, 153 Mo. 676, 683; McBaine v. Johnson, 155 Mo. 191, 200; Land Co. v. Thompson, 157 Mo. 647, 654.

This is irrespective of the question as to whether the grant

carries title to high or low-water mark. Commenting on this proposition in Shively v. Bowlby, 152 U. S. 1, 35, the court said:

"The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or State as private persons; and is independent of the law governing the title in the soil covered by the water;" Handly v. Anthony, 5 Wheat. (18 U. S.) 374, 380; Jefferis v. East Omaha Land Co., 134 U. S. 178, 189-193; Nebraska v. Iowa, 143 U. S. 359, 360; County of St. Clair v. Lovingston, 23 Wall. (90 U. S.) 46, 68; Barney v. Keokuk, 94 U. S. 324; Meyers v. St. Louis, 8 Mo. App. 266, 272; Cooley v. Golden, 117 Mo. 33, 48. And the fact that they were aided or caused by artificial means is immaterial; Whyte v. St. Louis, 153 Mo. 80, 87; Tatum v. St. Louis, 125 Mo. 647, 654; Jones v. Soulard, 24 How. (65 U. S.) 41, 43, 64; St. Clair County v. Lovingston, 23 Wall. (90 U. S.) 46, 66; Railroad v. Illinois, 146 U. S. 387-445.

8. The eastern line in this survey is expressed in the field notes to be a meander line on the right bank of the river, between high and low-water mark, and it varies with the river in its course, but if they had merely stated it to be a line on or along the bank, it would have been a meander line.

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State Courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary;" Hardin v. Jordan, 140 U. S. 371, 380; affirmed, Mitchell v. Smale, Id. 406, and Grand Rapids & Ind. Rd. Co. v. Butler, 159 U. S. 87, 92; Jefferis v. East

Omaha Land Co., 134 U. S. 178, 196; St. Clair County v. Lovingston, 23 Wall. (90 U. S.) 46; Railroad Co. v. Schurmeier, 7 Wall. (74 U. S.) 272, 286; Forsyth v. Smale, 7 Bissell, 201, 204; Shelton v. Maupin, 16 Mo. 124, 126; Smith v. St. Louis Public Schools, 30 Mo. 290, 309; Labeau v. Gaven, 37 Mo. 556; Cooley v. Golden, 117 Mo. 33, 54; Wood v. Appal, 63 Pa. St. 210, 221; Moore v. Willamette Trans. etc. Co., 7 Oregon, 355, 356; St. Paul etc. Rd. Co. v. First Division etc. Rd., 26 Minn. 31; Ladd v. Osborne, 79 Iowa, 93, 95; Weber v. Pere Marquette Boom Co., 62 Mich. 626; Stephenson v. Goff, 10 Rob. 99; Menesha Wooden Ware Co. v. Lawson, 70 Wis. 600; Turner v. Parker, 14 Ore. 340; Norcross v. Griffith, 65 Wis. 599, 609; Gould on Waters, sec. 76. The word "meander," as used in said field notes, meant to follow the sinuosities of the river; Turner v. Parker, 14 Ore. 340, 341, and located as this line was, it would have been a meander line without such designation, or any mention of the river in the patent; Norcross v. Griffith, 65 Wis. 599, 609.

9. The plat of U. S. Survey No. 3333 shows clearly that there was no land between its eastern line and the river; only a sandbar, part of the river bed, marked "sand beach" and plainly stamped on its face, "Mississippi River." There is an arrow on it showing the course of the water over it. Also a couple of fine lines broken at short intervals, immediately east of said eastern line, indicating small banks left by the water as it fell, the line itself meandering or varying with the course of the river. Further, a dotted line drawn from point F, over the sandbar, being an extension of the north line of the survey, which runs at an angle of 2½ degrees north of east (not due east as the north city limit line runs, and which is nowhere mentioned), showing where the north line would have been continued if the sandbar had been land. This plat demonstrates that, wherever the eastern line was drawn, it was a meander line on the river and that the boundary of the survey was the river; Shelton v. Maupin, 16 Mo. 124, 126-128; Railroad Co. v. Schurmeier, 7 Wall. (74 U. S.) 272, 276; Hardin v. Jordan,

140 U. S. 371, 373; Jefferis v. East Omaha Land Co., 134 U. S. 178, 194; Grand Rapids & Ind. Rd. Co. v. Butler, 159 U. S. 87, 89; St. Paul etc. Rd. Co. v. First Division etc. Rd. Co., 26 Minn. 31. The case of Niles v. Cedar Point Club, 175 U. S. 300 (54 U. S. App. 668), in no manner modifies or conflicts with the foregoing citations, as Justice Brewer bases his opinion in the latter case on the ground that the marsh was land, not a sandbar as in this case, and that the surveyor suspended his work and left, p. 306. As shown by the plat in 54 U. S. App. 672, nearly two sections of land lie between where the surveyor quit work and the lake, and this land is not marked lake on the plat. And see Horne v. Smith, 159 U. S. 40, 45.

10. The alluvion formed to U. S. Survey No. 3333, as a calculation made from a plat shows, exceed 94 acres (and lots 33, 34 and 35, run through three and a fourth blocks of it, immediately west of the premises sued for), and at a low estimate is worth $2,000,000. In 1854, in the case of West v. Cochran, 17 How. (54 U. S.) 403, 410, it was held that said survey was merely a retracing of the lines of Soulard's survey and in 1869, in the case of Maguire v. Tyler, 8 Wall. (75 U. S.) 650, 655, it was held that Soulard's survey was bounded on the east by the river. These were followed by the decision in Tyler v. Wells, 2 Mo. App. 526, in 1876, affirmed, 70 Mo. 33, in 1879. These decisions are *stare decisis* of the question that the eastern boundary of this survey is the river, and established a rule of property in that respect, and we respectfully suggest that they should be adhered to as such, and this case reversed, as it invalidates all private titles to said alluvion, and there are many of these titles, and large and valuable improvements on the lands, which have been held for a generation at least, under the former rulings; Wilson v. Beckwith, 140 Mo. 359, 381.

The cases cited in the opinion of the Supreme Court of Missouri herein, are reviewed in the argument appended hereto, and the mistakes in said opinion are also noticed.

11. The recitals and statements in said patent to Louis Labeaume or his legal representatives, show that the confirma-

tion vested the equitable title to the land confirmed in said Labeaume and it was final and binding on the United States; Strother v. Lucas, 12 Pet. (37 U. S.) 410, 454; LesBois v. Brammel, 4 How. (45 U. S.) 449, 457, 463; Landes v. Brandt, 10 How. (51 U. S.) 348, 370; Willot v. Sandford, 19 How. (60 U. S.) 79, 80, and it states all of the facts required to make a perfect legal title in said Labeaume, under said Act of Congress of June 6, 1874, to said confirmation, and said recitals and statements are legal evidence; Wright v. Roseberry, 121 U. S. 488, 497-499; Langdeau v. Hanes, 21 Wall. (88 U. S.) 521, 529. This Act is curative in its effect, in furtherance of justice and should be liberally construed. It was enacted long after the patent in this case was issued, and no doubt was intended at least in part to correct an omission of a portion of the land confirmed, from a survey, and relieve the confirmee from the binding effect of its acceptance, as previously held in Smith v. City of St. Louis, 21 Mo. 36, 39, and cases cited, and if said patent was defective and failed to convey said confirmation or any part thereof, to said Labeaume or his legal representatives, then said Act of Congress conveyed the same or the remainder of it; Campbell v. Laclede Gas Light Co., 119 U. S. 445, 446, and vested riparian rights in the grantees, as Soulard's survey and said confirmation are unquestionably bounded by the Mississippi River. And see also, Ryan v. Carter, 93 U. S. 78, 81.

12. The objection to reading the patent to Louis Labeaume or his legal representatives, in evidence, was properly overruled by the State Circuit Court, because, it was not well taken and for the additional reason that it was competent evidence to prove the Spanish concession, survey and confirmation to said Labeaume; Wright v. Roseberry, 121 U. S. 488, 497-499; Langdeau v. Hanes, 21 Wall. (88 U. S.) 521, 529. It necessarily follows that the same objection to each of plaintiff's deeds was properly overruled. The death of plaintiff's husband, in 1872, vested the legal title of the lots, formerly held

by her trustees, in her; Roberts v. Mosley, 51 Mo. 282, 286; Baker v. Nall, 59 Mo. 265, 268.

13. The plats read in evidence by both plaintiff and defendant locate her lots through the alluvion in the same manner, and they are conclusive on that question in this case; Land Co. v. Thompson, 157 Mo. 647, 654. And the long acquiescence of all parties in this location, is conclusive of its correctness, "not upon the theory that they are only evidence of a parole agreement establishing the line, but because they are of themselves proof that the location is correct, and of so controlling a nature as to preclude the contrary;" Bartlett v. Brown, 121 Mo. 353, 363; Coleman v. Drane, 116 Mo. 387, 395; Schad v. Sharp, 95 Mo. 573, 578; Jacobs v. Moseley, 91 Mo. 457, 462; Turner v. Baker, 64 Mo. 218, 238; Blair v. Smith, 16 Mo. 273, 281; Taylor v. Zepp, 14 Mo. 482, 489; Gould on Waters, sec. 162, and the agreement between Tyler and the Buchanan heirs, and the tax receipts and plats, are competent evidence on the question of location; Sparhawk v. Ballard, 1 Met. (42 Mass.) 95, 100; Schools v. Risley, 40 Mo. 356, 370, and same case, 10 Wall. (77 U. S.) 93, 96, 112. Under this state of facts the deeds in plaintiff's chain of title were to be construed by the court as matter of law; Hunt v. Mo. Pacific Ry. Co., 75 Mo. 252, 255; Hafner v. Cotton, 136 Mo. 216, 224; Willi v. Dryden, 52 Mo. 319, 322; Waddell v. Williams, 50 Mo. 216, 219.

14. Plaintiff had actual possession of a portion of her lots, and a legal title to the whole, and exercised the usual acts of ownership over the whole of them to the river. Her actual possession of a part of them, with siezin of the whole drew to her the constructive possession of the whole of them, until she was actually ousted by defendant, in 1891, of the premises in controversy; Bradley v. West, 60 Mo. 33. She never laid out or dedicated any street or streets through them (nor was she made a party by service of process to any legal proceeding, nor was any judgment rendered for that purpose); but if she had done so, it did not separate them into different tracts nor de-

prive her of the possession or exercise of control over them as a tract, by virtue of the actual possession she had of them by reason of the houses on the west end of them; Williams v. Ballance, 23 Ill. 193, 197, affirmed, Hassett v. Ridgway, 49 Ill. 197, 205-206; Janes v. Patterson, 62 Ga. 527, 531; Hubbard v. Austin, 11 Vt. 129, 133, and see Campbell v. Laclede Gas Light Co., 84 Mo. 352, 372-3. Ejectment is a proper remedy for said ouster of plaintiff, by defendant; Anderson v. St. Louis, 47 Mo. 479, 486; Armstrong v. St. Louis, 69 Mo. 309, 311; McCarty v. Clark County, 101 Mo. 179, 182. And the fact that the railroad company, either as an original trespasser or by permission of defendant, given in any manner, built a track across these premises, did not change this remedy. Plaintiff did not in any manner induce the trespass on these premises, whichever one of them committed it originally, nor induce the railroad company to build such track, nor did plaintiff have any notice that the permission, if any, would be given or that the railroad track would be built. But if she had been specially notified of the latter fact, and failed to take any notice of it, it would not have affected her right to maintain ejectment against either or both of them, if the railroad were a party to this action; Walker v. Chicago, Rock Island and Pac. Ry. Co., 57 Mo. 275; Bradley v. Mo. Pacific Ry. Co., 91 Mo. 493, 499; Childs v. K. C. St. J. & B. C. Ry. Co., 117 Mo. 414, 432; Scarritt v. K. C. & S. Ry. Co., 127 Mo. 298, 303.

15. Defendant by its answer, alleges that it had been in the adverse possession of the premises in controversy for ten years next prior to the filing of the petition herein (the latter being the time of the commencement of this suit; South Mo. Lumber Co. v. Wright, 114 Mo. 326, 331; McGrath v. St. Louis, K. C. & C. Ry. Co., 128 Mo. 1, 6). This is a conclusive admission of possession of the whole of them, and defendant can not deny such possession. Ramsey v. Henderson, 91 Mo. 560, 564; Pike v. Martindale, 91 Mo. 268, 286; Wright v. Butler, 64 Mo. 165, 166; Tomlinson v. Lynch, 32 Mo. 160, 169; McCarty v. Clark County, 101 Mo. 179, 183; Tatum v.

City of St. Louis, 125 Mo. 647, 652. Defendant occupies the same position as if it had entered its appearance to defend its tenants, and took upon itself the burden of the defense, thereby making the possession its own; Warren v. Carter, 92 Mo. 288, 292; Hill v. Atterbury, 88 Mo. 114, 117. Moreover, defendant claimed on the trial of this cause, a dedication of the premises in controversy, by plaintiff, to defendant, and it is thereby estopped from disputing even the title of plaintiff to them; City v. Draper, 36 Mo. 332, 336; McGinnis v. St. Louis, 157 Mo. 191, 195; Fellows v. Wise, 49 Mo. 350, 352; Brown v. Brown, 45 Mo. 412, 414; Miller v. Hardin, 64 Mo. 545, 546; Milling Co. v. Riley, 133 Mo. 574, 584.

16. Plaintiff's occupation by tenants of the western end of these lots, and her continued acts, through her agents, in looking after and caring for the premises in controversy to the time that defendant ousted her, as shown by the undisputed testimony disproves any intention on her part to dedicate them, and the agreement in regard to a division line between Mary L. Tyler and the Buchanan heirs, endorsed on a private unrecorded plat attached to an abstract of title, extends the line between them to the river, and clearly negatives any intention on their part to make a dedication, otherwise they would have called for the Western Wharf line as a terminus, and to claim that because plaintiff was compelled to read it in evidence in an action to recover these premises, in order to locate them, whatever her attorneys might have said in regard to it, is extremely far fetched and clearly untenable. The latter line on said plat marks the western boundary of the wharf, as established by City Ordinance No. 5403 (but unopened and unused as such), by which defendant proposed and still proposes to condemn and pay for said premises, and it was placed on the plat by the abstractor for the information of the parties for whom he made the plat, and without it the abstract would have been imperfect. The lines on a plat, except in the absence of any words on it to indicate the intention of the maker as to a dedication, are not evidence of such intent, but the

words endorsed on it always control in that respect, and marks on a public recorded plat, in order to evidence an intention to dedicate, must be of something exclusively and equivocally public, therefore the mark of "wharf" on this plat if a public one and unexplained by the agreement endorsed on it, would not constitute a dedication, as a private wharf might have been intended; Palen v. Ocean City, 64 N. J. Law, 669, 670-673; Hurley v. Mississippi & Rum River Boom Co., 34 Minn. 143, 147; Yates v. Milwaukee, 10 Wall. (77 U. S.) 498, 499, 506-507; Domer v. St. Paul & Chicago Ry. Co., 23 Minn. 271, 275; Cowles v. Gray, 14 Iowa, 1, 4; Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 236. And see Hennepen County v. Dayton, 17 Minn, 260, 261 (County Block); Scott v. City of Des Moines, 64 Iowa 438, 444 (Market Square); City of Pella v. Scholte, 24 Iowa 283, 288 (Garden Square); David v. Municipality No. 2, 14 La. Ann. 872 (Market); Saulet v. City of New Orleans, 10 La. Ann. 81, 82; Municipality No. 2 v. Palfrey, 7 La. Ann. 497; Attorney-General v. Whitney, 137 Mass. 450. The last three cases involved unmarked triangular pieces of land, long neglected by their respective owners.

The concession of plaintiff's attorneys in regard to this agreement and plat, obtained in an evident attempt to surprise them into what was supposed to be a damaging admission, and persistently put forward by defendant's attorneys as having great, but unexplained weight in favor of defendant, merely conceded the legal effect of them, and could have no other force, as neither a party nor his attorney can concede or admit away the law in his case; Crockett v. Morrison, 11 Mo. 3, 5; State ex rel. v. Smith, 150 Mo. 75, 88. The survey ordered by Mr. Collins for his own use in ousting squatters, of a small portion of plaintiff's lots, has no bearing whatever on this case.

17. The defense of an outstanding title and adverse possession in the Buchanan heirs, under the Easton patent, and mesne conveyances failed completely under the evidence, for if there had been an actual occupancy by them of the premises sued for, defendant's testimony showed there was no intention

to claim title beyond the true line, and therefore the statute of limitations never began to run against plaintiff; McCabe v. Bruere, 153 Mo. 1, 5; Brummel v. Harris, 148 Mo. 430, 440, 442; Ernsting v. Gleason, 137 Mo. 594, 597; McWilliams v. Samuel 123 Mo. 659, 662; Shotwell v. Gordon, 121 Mo. 482, 484, and further showed that there was no possession of the premises in controversy, and the agreement for a division line and acquiescence in it, as we have seen, settled that question. The little use made of the premises in controversy, for the purpose of navigation, by the general public, was made under legal right to so use them; O'Fallon v. Dagget, 4 Mo. 343, 346; and this use instead of being adverse to plaintiff, prevented any adverse possession or use of them by defendant; Green vs. Chelsea, 24 Pick. (41 Mass.), 71, 79; State v. Wilson, 42 Me. 9, 26. Building the dike in front of them did not constitute adverse possession of these premises; Tatum v. St. Louis, 125 Mo. 647, 657; Whyte v. St. Louis, 153 Mo. 80, 88. It was built out in the river, to protect the harbor, under an Act of the Legislature; Laws Mo., 1844-5, p. 90; Myers v. City, 82 Mo., 367, 376. And the use made of them by defendant, if it had been for wharf, instead of leasing them for a lumber yard, was for less than four years prior to the institution of this suit, and in order to have affected the title, it must have been continued for the full period of ten years; Field v. Mark, 125 Mo. 502, 516; Rosenberger v. Miller, 61 Mo. App. 422, 426.

18. Having failed in the defense of an outstanding title and adverse possession in the Buchanan heirs, counsel for defendant, evidently as an after thought, attempted to defend on the ground of estoppel, or dedication by matters *in pais*, which is the same; McGinnis v. St. Louis, 157 Mo. 191, 195. This defense is utterly inconsistent with the former named defenses and should not be permitted; but if it were proper, estoppel is not pleaded in the answer, and in order to make it available as a defense, it is necessary to specially plead it, in ejectment, under the Missouri practice; Casler v. Gray, 159 Mo. 588, 595; Throckmorton v. Pence, 121 Mo. 50, 60; Avery v. Railroad, 113 Mo.

561, 568; Bray v. Marshal, 75 Mo. 327, 330. It is not available as a defense, unless pleaded, even where the evidence tends to support it; Electric Ry. Co. v. Curry, 154 Mo. 10, 20. And see Sanders v. Chattrand, 159 Mo. 544, 558; Cockrill v. Hutchinson, 135 Mo. 67, 75.

19. But if estoppel had been specially pleaded in the answer, there is no evidence, which must be substantial evidence, to prove it, or to sustain a verdict for defendant if one had been rendered in its favor. And the same is true of the facts stated in the opinion of Judge Adams, in the ejectment case of King et al., v. The City of St. Louis, printed in the brief of defendant on motion to dismiss or affirm this case. 46-59, if that could be considered herein. A party to be estopped must be informed of the facts in the case, and must then do some positive act or make some positive statement, intending that it should be acted on by the party to whom it is made, and the latter must act in consequence thereof and do what would otherwise be to his injury, and make it inequitable and unjust for the first party to repudiate his act or statement; Scrutchfield v. Sauter, 119 Mo. 615, 623; Blodgett v. Perry, 97 Mo. 263, 272; St. Louis v. Schulenberg-Boeckler Lumber Co., 98 Mo. 613, 617.

20. There was no estoppel in building the dike in front of these premises, but it might have furnished the basis of an action for damages; St. Louis v. Meyers, 8 Mo. App. 266, 274, affirmed, 82 Mo. 367, 378. The proceedings to open Kennett formerly Hall Street, do not purport to affect the premises in controversy, but if they did, there was no judgment rendered by the Land Commissioner, and the return of the notice in the case is void on two grounds, having but one copy for two defendants and making one person a member of two families; Stewart v. Stringer, 41 Mo. 400, 404, and see Gamasche v. Smith, 60 Mo. App. 161, 163. And the deed by the Marshal under them is void, in addition to the foregoing, as being a portion of the lots with no description sufficient to identify which portion of them was intended to be conveyed;

Jones v. Carter, 56 Mo. 403, 405.

The redemption of the premises from the void sale under them could not validate the proceedings; Heidelburg v. St. Francois County, 100 Mo. 69, 76; Kiley v. Oppenheimer, 55 Mo. 374, 376; State v. Bank, 45 Mo. 528, 541. Aside from this question, there is no estoppel in buying peace and accepting a deed from an adverse claimant of land; Macklot v. DuBrevil, 9 Mo. 477, 480; Landes v. Perkins, 12 Mo. 238, 258; Blair v. Smith, 16 Mo. 273, 280; Cutter v. Waddingham, 33 Mo. 269, 282; Wilcoxon v. Osborn, 77 Mo. 621, 629; Cummings v. Powell, 97 Mo. 524, 536. Nor can there be any estoppel under a void deed; Douthitt v. Stinson, 63 Mo. 268, 279; Reinhard v. Va. Lead Mining Co., 107 Mo. 616, 627.

21. A person can not be deprived of his property except by his consent or by due process of law. No process of law is claimed in this case, but instead, a dedication by the owner. In order to constitute such dedication the intent to do so on the part of the owner must clearly appear, and "the proof ought to be so cogent, persuasive and full as to leave no reasonable doubt of the owner's intent and consent. The conduct and acts relied on to establish the intent of the owner should be inconsistent and irreconcilable with any construction except such consent;" Bauman v. Boeckler, 119 Mo. 189, 199; Barker v. Squire, 143 Mo. 92, 98; Baker v. Vandenberg, 99 Mo. 378, 391; and where acts and declarations of an owner are relied on for this purpose they must indicate "the intent to dedicate his land to public use, must be unmistakable in their purpose and decisive of their character. There must be a clear intention on the part of the owner to devote it to public use;" Baker v. Vandenberg, 99 Mo. 378, 391; Vossen v. Dautel, 116 Mo. 379, 384; Los Angelos v. Kysor, 125 Cal. 463, 465; Eureka v. Mackay, 123 Cal. 666, 670; People v. Beaubien, 2 Douglas, 256, 271; Yates v. Milwaukee, 10 Wall. (77 U. S.), 498, 506, 507.

22. In Anderson v. City of St. Louis, 47 Mo. 479, a

case involving this North Wharf, established by said Ordinance No. 5403, but unopened, the plaintiffs attempted to enjoin the defendants from taking possession of a portion of it and from disturbing them in the peaceable possession of their land without having legally condemned it. The court held that the claim of defendant was illegal and void but refused plaintiffs relief on the ground that it was a trespass sought to be enjoined that might be compensated in damages and for which ejectment would lie; p. 86. And see Leslie v. City of St. Louis, 47 Mo. 474. This decision did not affect the City Blocks laid out by the Street Department, and the Assessor's Office, having previously adopted them for the purpose of assessment continued to so use them, and did not assess these premises. Plaintiff was not consulted and had no control over this matter, and it is now urged by defendant as a dedication of her property, with no evidence to show that she ever knew of such claim, much less that she consented to a dedication of her land.

23. The acts relied on as an estoppel to show dedication, are, failure to return the premises sued for with the remainder of the lots, to be assessed for taxation, failure to pay taxes on them, and payment of tax bills on the portion of the lots lying west of them on which the lots are described as bounded on the east by the wharf. The first is entirely without evidence to support it as there were no returns for assessment either by or for her, offered in evidence. The payment of the tax bills bounding the property on which payment was made, on the east by the wharf, if made by plaintiff, was not a dedication; City v. Wetzel, 110 Mo. 260, 264. These were made by agents who retained the tax bills. If they were otherwise competent evidence on the question they would have no tendency to prove a dedication by plaintiff, without evidence, and there is none, that they had authority from her to make it; California Navigation and Improvement Company v. Union Transportation Company, 126 Cal. 433, 441; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261, 270, besides

the acts of said agents in caring for them, disproved any intention on their part, to make such dedication. The payment of said tax bills by plaintiff in person, if ordinarily a dedication, would have no tendency in this case to prove an intent on her part to dedicate the premises in controversy for wharf, as defendant by Ordinance No. 5403, established them as such, proposed and still proposes by said ordinance to condemn and pay for them for that purpose, made the plats and marks on them and the tax bills and failed or refused to assess them, and these facts evidence no intention on her part to thereby dedicate them; Avery v. Stewart, 1 Cush. (55 Mass.), 496, 501; even if she had so bounded them in a deed, whatever might have been its effect as between her and her grantee; Brooklyn Street, 118 Pa. St. 640, 646; In re Wayne Avenue, 124 Pa. St. 135, 137. And see Mayor v. Sackett, 44 N. J. Law, 428, 429.

24. Aside from the foregoing the boundary in the tax bills is a mere reference, made by defendant, simply for the purpose of location or description of the premises assessed, and if inserted by plaintiff would not have been a dedication. An owner is not bound by a plat of his land made by another person, and an unrecorded private plat, made by an owner, is not evidence of a dedication of any part of the land platted without a sale of lots in accordance with it; Heitz v. City, 110 Mo. 618, 625; Thurston v. City, 51 Mo. 510, 512. In the latter case, the question of dedication rests entirely upon the implied covenant with the purchaser, contained in the deed, that there is such a highway there; Whyte v. St. Louis, 153 Mo. 80, 90.

"Mere reference to street for purpose of description. It must clearly appear that the parties to the deed recognize the street or road as a public one, either already in use or as to which, as far as the owner of the land is concerned, the dedication is complete; a mere reference to a street or road, or a recital of its existence simply for purposes of location and description or to give the boundaries of the land conveyed, is

not sufficient;" 2nd Ed. 9 Am. & Eng. Ency. of Law 56 and note 1; Id. 58 and note 1, p. 59, to which we add the cases of Putnam v. Walker, 37 Mo. 600, where an alley was called for, but did not constitute a dedication; Pierce v. Chamberlain, 82 Mo. 618, 621, where a 40 foot strip of land bounding the land conveyed was deeded for a street, and it was held not to be a complete dedication until accepted and used for the purpose, and Vossen v. Dautel, 116 Mo. 379-384, where a deed called for the Schuetz road as a boundary, and it was held not to be a dedication of it, but that it was a private road, and not a public one, and the same in People v. Beaubien, 2 Doug. (Mich.), 256, 283.

25. Failure to pay taxes on, and neglect of property for many years, do not constitute a dedication of it to public use. The following contains the substance of some of the best considered cases on this question.

In Attorney General v. Whitney, 137 Mass. 450, a triangular piece of land was shown on a plat made by the owner and colored green on the plat, and the owner treated the piece of land as if it were to be kept open, did not enumerate it on a schedule of his property, sold lots by a plan on which it appeared as an open space, and the City filled up the land at its own expense and for many years did not tax it, and these facts were adjudged insufficient to prove a dedication of it to the public.

In California Navigation & Improvement Co. v. Union Transportation Co., 126 Cal. 433, a strip of land 150 feet wide and 1000 feet long, adjacent to San Joaquin river, was claimed as having been dedicated by a manager and agent; held, that the appointment of an agent to manage, does not imply authority to dedicate, and his authority to do so must be shown. To the same effect Niag. Falls Sus. Bridge Co. v. Bachman, 66 N. Y. 261, 270.

In Municipality No. 2 v. Palfrey, 7 La. Ann. 497, and Hiques v. Bujac, Id. 498, an irregular shaped piece of ground on a plat, unmarked, with a cessation of any use of it as pri-

vate property, it being low and marshy, and no claim made to it nor payment of taxes on it for 40 or 50 years, when no use was made of it inconsistent or adverse to the owner, does not constitute a dedication. It might not have been assessed for taxes.

In City v. Lecraw, 17 How. (58 U. S.), 426, flats belonging to the City of Boston, which, while covered with water all persons might use in navigation, were so used by the public down to 1850, after which and the first use made of them by the City, it built a sewer on them. Held no dedication to the public, and that a man can not lose title to his land by leaving it in a state of nature, or forfeit it by non-user, and that there was no evidence of dedication in the case to submit to the jury. And see State v. Wilson, 42 Me. 9.

In Green v. Chelsea, 41 Mass. (24 Pick.) 71, devisee of flats never enclosed, of which no one had exclusive possession or claimed ownership (devisor doubting whether his deed included them), but used by all persons coming by land or water who had occasion to pass over them or make some brief use of them, by landing wood &c., thereon. Held, to be vacant, and that the devisee acquired a seizin without an entry. Further, that such uses by individuals did not tend to show possession by the town, but on the contrary were adverse to such claim, and the omission by the owner to fence such flats bounding on the sea, and such use of them by others, did not prove a dedication of them to the public.

In Yates v. Milwaukee, 10 Wall. (77 U. S.), 498, an owner had platted his land into blocks and lots so that a line of the lots was out in the lake at the time the plat was made, but the water subsequently subsided beyond it, and it was held that this was not a dedication of the land beyond the lot lines, notwithstanding the Supreme Court of the State (Wisconsin) had so held, and also that dedication was a matter of common law, and this court was therefore not bound by the ruling of the State Court; pp. 506, 507.

26. We do not deem it necessary to pursue these cita-

tions further, and shall close these points with a brief notice of Skrainka v. Allen, 2 Mo. App. 387, 396, relied on by defendants. There are three very marked and controlling distinctions between the facts in the latter case and the one at bar, which are, that Mr. Allen made and filed the plat himself, on which the street was laid out, therefore he was informed of all the facts in the case; and the next is, that there was no proposition pending on the part of the City to take and condemn the property, and his lot was returned for assessment bounded by the street and he permitted the Contractor to pave the alley abutting on the street, for the payment of which a special tax bill was issued without notice or protest. This was held to be evidence tending to prove a dedication. Further, the case was tried on an agreed statement of facts, pp. 388, 394, and the authority of the agent to make a dedication impliedly admitted, and it was not questioned.

27. The plaintiff showed a perfect legal title to the premises sued for, by evidence given in her own behalf and it was corroborated by the evidence for the defendant. Indeed the defendant claimed title by dedication under her and thereby, as we have seen, estopped itself from disputing her title. This left questions of fact only, to be decided by the court, sitting as a jury, the burden to establish them being on defendant. The instructions given by the court fairly presented the questions, and the court rendered a verdict for plaintiff. The form of the instructions in such case is not material. It may be a direction to find for one of the parties, and it is a mere verdict or finding of facts, and if sustained by substantial evidence, it will not be disturbed; Bailey v. Gunning, 155 Mo. 682, 683; Hess v. Clark, 11 Mo. App. 492, 493; Dyer v. Reitz, 14 Mo. App. 45, 49. In trials before the court instructions generally are of little use except to show the theory on which the court tried the case; Cooper v. Ord, 60 Mo. 420, 421; Cook v. Farrah, 105 Mo. 492, 508; Benne v. Benne, 56 Mo. App. 504, 508; Perkins v. School District, 61 Mo. App. 512, 514. When a verdict, as in this case, is clearly for

the right party it should be sustained whatever error may have been committed on the trial; Orth v. Dorschlein, 32 Mo. 366, 368; Jackson v. Magruder, 51 Mo. 55, 59; Vaughan v. Daniel, 98 Mo. 230, 232; Williams v. Mitchell, 112 Mo. 300, 315; Brobst v. Brock, 10 Wall. (77 U. S.), 519, 528. And a verdict on facts is conclusive in favor of the party for whom it is rendered; Minton v. Steele, 125 Mo. 181, 190; Grant v. Moon, 128 Mo. 43, 49; Kahn v. Cotton, 136 Mo. 216, 225; Bray v. Kemp, 113 Mo. 552, 554; Brown v. Brown, 106 Mo. 611, 616.

ARGUMENT.

We shall not make an extended argument on the foregoing, believing that few of the points herein before made require any. The cases cited to point 8, on the question of a meander line, show that various pieces of land laid between the meander line and the water, varying from about twenty-five acres of land in addition to a large sand beach between it and the lake in the case of Mitchell v. Smale, 140 U. S. 406, 415, which passed with a fractional quarter section of land containing but 4.53 acres within its meander lines, down to a sandbar, in the case of Stephenson v. Goff, 10 Rob., 99, 100, where the survey commenced at a point above and reached a place on the bank of the river, and then ran along the edge of a mud and sandbar, as near as practicable (just as in the case at bar), so as to include all of the land susceptible of ownership. The sandbar in the case (10 Rob.) was overflowed every year, at the time of making the survey (just as in the case at bar it must have been), in times of moderate high water. At a low stage of water, the distance from the main land across the bar to the water was nearly half a mile. There were some ridges on the bar, some places higher than others, on which were trees—small cotton-wood and willows. It was held in the case, that

the sand bar was not land; that the land subsequently formed of it passed to the owner of the survey, as alluvion, and the court reversed a judgment in favor of the defendant, who was a tresspasser upon it, and entered judgment in favor of the plaintiff, who owned the survey, and quieted his title. In all of the cases found in the course of a very laborious and lengthy examination, not one has been found that throws a shadow of doubt on the correctness of this decision in 10 Rob., but all found having any bearing on it support it, save the decision in the case at bar by the Supreme Court of Missouri, and the *agri limitati* of the Romans.

It is claimed that this eastern line is a fixed line. All surveyed lines are necessarily fixed lines, as a compass will not follow a circle, and surveyors do not wade out in the water to run lines; Wood v. Appal, 63 Pa. St. 210, 221, but they do not limit the grant on rivers. The doctrine of a fixed line is the *agri limitati* of the Romans. These were grants of conquered territory to veteran soldiers retired from active service. They were squares containing thirty-three or one hundred and thirty-three acres and their boundaries, called *limites,* were marked by a slip of land left for the purpose untouched by cultivation, as balks or highways, and when they bordered on streams, they were not entitled as other riparian lands were, to accretions, but confined to the lines.

This is contrary to the common law; Hardin v. Jordan, 140 U. S. 371, 399. The nearest to such a doctrine in our law is in the case of Smith v. St. Louis Public Schools, 30 Mo. 290, 301, where the tract was bounded on the east by a street but wherein it is plainly shown that if the line had varied with the river, instead of being a straight one along the street, the result would have been otherwise (p. 309), so that the meander line in this case, down the bank, with the meanders of the river, between high and low-water mark, means a line which follows the sinuosities of the river, makes the river the boundary and comes clearly within the many rulings and carries riparian rights; Turner v. Parker, 14 Or. 340; Schurmeier v. Railroad Co., 10 Minn. 82, 101.

The recitals in the beginning of this patent, state that a Spanish concession was made to Louis Labeaume, in 1799, of about 360 arpens of land, surveyed in the same year to the amount of 374 Arpens, by Antoine Soulard, Surveyor General, a confirmation of said claim to said Labeaume by the old Board of Commissioners in September, 1810, the issuance of a patent certificate on said confirmation, in 1811, a decision of the Secretary of the Interior, in July, 1851, that "those claiming under Labeaume are entitled to a patent for the land according to Soulard's survey and Labeaume's possession, and that the lines of said Soulard's Survey have been retraced in accordance with the decision referred to, as appears by the plat and transcript of survey, numbered three thousand three hundred and thirty-three, which accompany said patent certificate." It further states the approval of the latter plat and survey and that it contains 339.68 acres, and said plat and survey are copied in the patent. The remarks in the patent, which immediately follow the field notes contained therein, the usual place for stating boundaries in conveyances, and by which any inaccuracies or uncertainties in the detailed description are usually corrected, are found not only to place the fourteen acres of accretions stated therein to have been formed to Soulard's survey, within U. S. Survey No. 3333, to aid in making up the 21.52 acres of excess of area of the latter over the former found to exist, not only include all of the land then formed, to the river, but they expressly bound the former by the Mississippi River on the East, and by necessary implication the latter also, thus conforming the survey to the direction of the Secretary of the Interior, to retrace the lines of Soulard's survey, and his decision that they had been so retraced, even if there was anything in the patent, which there is not, inconsistent therewith. Clearly this call in the patent for the River as the Eastern boundary, carried riparian rights, as it controls courses, distances and quantity, and the corners, monuments and meander lines of a survey; Gould on Waters, Sec. 194.

The remarks also distinctly state that the accretions are rapidly advancing, the clear inference from which is that they are to be included also, as they form.

The boundaries of said plat and survey No. 3333, the Secretary of the Interior ordered to be a retracing of the lines of Soulard's survey (thus making them the original plat and survey), and approved them as a retracing of the lines of the same, in accordance with the decision referred to, and an inspection of Soulard's plat and survey leaves no possible doubt that it was bounded by the Mississippi River on the East, and it was so held, and that U. S. Survey No. 3333 retraced its lines and that the patent was based on the former survey, in West v. Cochran, 17 How. (58 U. S.), 403, 410; Maguire v. Tyler, 8 Wall. (75 U. S.), 650, 655, and Tyler v. Wells, 2 M. A. 526, affirmed 70 Mo. 33.

But if there had been no adjudication by the Secretary of the Interior, nor the Courts, that the patent was for Soulard's survey, nor that the lines of the latter were merely retraced in U. S. Survey No. 3333, and no specific call in the patent, as there is, for the Mississippi River as a boundary of the tract on the East, and if there had, in fact, been fourteen acres of land, as held in this case, by the Supreme Court of Missouri, East of the Eastern line meandered along the River on the plat of U. S. Survey No. 3333, and between it and the River, the plat shows no land between said line and the river, merely a sand-bar, plainly marked as part of the river, and was so both in law and fact—said line is a meander line only, not the boundary line, and the river is the boundary of the tract, on the East, by virtue of said plat, and the patent gave the grantees riparian rights.

The word riparian is derived from latin ripa, a river bank, and denotes such rights as follow or are connected with the ownership of the bank; Gould on Waters, sec. 148. The call in this case goes beyond the bank; between high and low water mark, and includes part of the river bed. Where the original

concession, the confirmation, and the survey, distinctly called for the bank of the Mississippi River as the Eastern boundary of the land granted and confirmed, it was held; that it is sufficient "to carry all the accretions made thereon since the origin of the title, there is not the least room for doubt;" Le Beau v. Gaven, 37 Mo. 556, 557-558. Unquestionably the greater call in this patent includes the less, and vests riparian rights under it, by reason of this call, as there is no limitation in this patent.

Grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are construed most favorably to the grantee, and that all land that might pass by it, actually passed; Gould on Waters, Secs. 195-6-7; Angell on Water Courses, Sec. 23; Grand Rapids & Indiana Railroad Co. v. Butler, 159 U. S. 87, 92.

The Labeaume and Easton patents, the former for U. S. Survey No. 3333, from which plaintiff derives title, and the latter for U. S. Survey No. 2042, from which George Buchanan and his heirs derive title, adjoin each other, and are shown to do so on the plat of the former survey, contained in the Labeaume patent, and point F, at the mouth of Rocky Branch, was their common termination at the river on it. The fact that both of them went to the river is emphasized in the call in the Easton patent read in evidence by defendant, which is simply to run down Rocky Branch to its mouth, which could not be reached without going to the river, and from there up the river. No mention is made in the latter patent of any sand beach or bar, in the river at that point. This in itself is conclusive evidence that point "F" in survey No. 3333, was the river, even if the mouth of Rocky Branch, the river or its bank, or high or low water mark had not been mentioned in the Labeaume patent in connection with it, and the Eastern line of the latter survey, had not been called a Meander line; Devlin on Deeds, Sec. 1028 b. vol. 2 (2nd Ed.); Norcross v. Griffith, 65 Wis. 599-609. The latter decision is very elab-

orate and examines the authorities at great length. In the case of St. Clair County v. Lovingston, 23 Wall. (90 U. S.), 46, 65, where the survey commented on commenced on the bank of the river, thence to a point in the river, and a final call to the beginning point, and the line between the points on the river was a straight one, instead of varying with the River, as in this case, it is said: "No sensible reason can be imagined for having the two corners on the river and the intermediate line deflect from it." As the N. eastern corner of U. S. Survey 3333, is expressed to be point F, at the mouth of Rocky Branch, and the South eastern corner is expressed to be a point on the right bank of the river, between high and low water mark, the two cases last cited effectually dispose of the argument that the eastern line of U. S. survey 3333, is a fixed and not a meander line on the river, and are conclusive that the river is the eastern boundary of it.

To briefly review the cases relied on in the opinion of the Supreme Court of Missouri, herein. Dunlap v. Stetson, 4 Mason 349, so confidently relied on, was based on the following call: "Beginning at a stake on the west bank of the Penobscot river * * * thence * * * to a stake and stone on the same bank of the same river; thence running on the western bank of said river to high-water mark;" p. 365.

This call was held to be restrictive to the front line of the bank itself, and that the title to the flats, between the bank and the river, did not pass. This ruling is in accordance with the one in Howard v. Ingersoll, 13 How. (54 U. S.), 381, 422, where it was held that the call for the "western bank" of the river, limited the effect of the grant and confined it to the western edge or bank, which would not have been the case if the word "western" had not been inserted therein. Gould on Waters, secs, 197 and 200; Angell on Water Courses, secs. 24 and 29; note. There is no such limiting call in the present patent, a point overlooked in said opinion, but the call is for a meander line, which made the river the boundary; Turner v. Parker, 14 Or. 340. Such a limitation we have seen would

not deprive plaintiffs of the accretions. Another point in the decision of the case of Dunlap v. Stetson, that was overlooked in said opinion, is the following:

"What is taken from the bank is an imperceptible increment to the flats, and passes to the owner of it, in the same manner as if there had been a like increment to the bank, it would have passed to the riparian (bank) proprietor;" p. 366; Hindson v. Ashby, 1 Ch. L. R. 1896, 78.

The application of the latter proposition in this case would have necessitated a different ruling.

In the case of Cook v. McClure, 58 N. Y. 437, the call is for "a stake near the high-water mark of the pond of the grist mill, thence * * * along the high-water mark of said pond." The pond was an artificial one, and the Court held that the call was a limitation to high-water mark;" p. 440. It further held that the reason given in cases where the boundary is upon the banks of streams, that it should go to low-water mark, so that the party should not be cut off from the water, did not exist in the case; p. 441. Neither the facts nor the law in either of these cases commented on, furnish any authority for the ruling herein. Besides, the cases from 4 Mason, 349; 13 How. (54 U. S.), 422; 58 N. Y. 437, as we have seen, are really in favor of plaintiffs; but if they were against plaintiffs, they can not have any application under the system of U. S. Surveys, established by Acts of Congress for the Western States; Gould on Waters, sec. 76, and cases cited on the question of meander lines to point 8.

(Other cases heretofore cited and relied upon by defendant's attorneys, are those of Child v. Starl, 4 Hill, 369, where the call was for the shore of the river, and it was held to go to low water mark; Bradford v. Cressy, 45 Maine, 9, called for the west bank of the creek; Daniels v. R. R., 20 N. H., 85, called for the easterly bank; and Healy v. McCormack, 3 Kernan 296, called for the bank of the creek and it was held to go to low water mark.)

The case of Ellinger v. Railroad, 112 Mo. 525, is much

the same as Smith v. St. Louis Public Schools, 30 Mo. 290, where the grant was bounded by a street, as the land in the former case, had been platted into blocks and streets by Carondelet, and Water street laid out between the lot purchased by the plaintiff, on which it fronted, and the river. Besides, the plat and dedication by Carondelet, in 1832, of the property, either vested the title in fee to Water street in the county, under sec. 3, p. 763, R. S. Mo., 1825, or the eastern half of it remained in Carondelet. In the former case the county owned the accretions, and in the latter case, as the purchaser of a lot bounded by a street takes title subject to the easement, only to the center of the street, Carondelet or its successor, the city of St. Louis, owned them; City v. Railroad, 114 Mo. 13; Banks v. Ogden, 2 Wall. (69 U. S.), 57, 69.

The decision in Smith v. City of St. Louis, 21 Mo. 36, is not the law in this case, as the Act of Congress approved June 6th, 1874, is a grant for this confirmation subsequent to the issue of the patent herein and to said decision, and the title granted by said act is in no manner affected by the estoppel in that case against the party by reason of his having accepted a survey that did not include all of the confirmation. Said act of Congress passed the title to all land in the confirmation in this case, that was omitted from the patent, if any was omitted, and vested riparian rights in the grantees. This Act is curative, remedial and in favor of justice, and it should be liberally construed, and the Supreme Court of Missouri erred in denying plaintiff any rights under it if the patent did not vest riparian rights.

The attempt to distinguish the plat in this case from the one in Shelton v. Maupin, 16 Mo. 126, is based on the assumed fact that the dotted line in the plat of U. S. Survey No. 3333, crossing the bar at the n. e. corner of the survey, from the point F, marks the northern line of the city and not of the survey, and that there is no evidence that the lines of this survey ever ran to the river. The former is a mistake, for the reason that the survey does not purport to lay down any north line of the

city or even mention one in the field notes. It only fixes the northern termination of the northern boundary line of it. From this point the city line runs due east, City Charter, sec. 1, p. 155, Laws Mo. 1850-1, and the northern line of the survey, of which the dotted line is an extension, runs north 87 degrees and thirty minutes east (an angle of 2 1-2 degrees north of east) at 5 chains and 46 links, to the point F, and therefore can not be the northern line of the city; besides, it is not necessary to plaintiff's case that the line be so extended on the plat, as the survey stopped at point F, the river. The dotted line shows where the survey line would have run if the sand bar had been land.

The statement that in Shelton v. Maupin it appeared that the lines ran to the river is a mistake also, as it is expressly stated therein that the purchase of the land sued for was made by the defendant upon the idea that the lines of the fractional survey did not extend to the Missouri River, and that the whole question in the case was, whether if it was true that the surveyor, in running the section lines in 1817, did not in fact extend the south and west lines to the river; or if since that survey accretions had formed in front of the fraction, so that the original corners established on the bank of the river were then distant from the stream, the sale to plaintiff, in 1844, would pass the land to the river, and it was held that as the plat showed the river as a boundary, plaintiffs took title to the river, and this ruling is specifically based on the effect of the plat, p. 128, and not that the survey lines extended to the river.

Another mistake in the opinion herein is in treating the ornamental pink shading inside the survey line marked on the plat, used by surveyors to call attention to the line surveyed, instead of the black line, as the survey line. And under the opinion the meander line would have been equally fixed and permanent if it had been drawn at low water mark, or in the water, and the result the same, as it applies the *agri limitati* of the Romans; Hardin v. Jordan, 140 U. S. 371, 398.

It was also by a mistake in locating these 14 acres of accretions to Soulard's survey, east of the eastern meander line of said survey No. 3333, and between said meander line and the river (instead of west of it, as the patent locates them), that the Court, in the opinion herein, based its rulings that the meander line of said survey was a fixed line, and that there were fourteen acres of land between said line and the river, and that the patent therefore did not give riparian rights. The incorrectness of the latter ruling has been shown, and it could be sustained only by reversing the plain and simple rule of addition; that is, by deciding that by adding to whatever little mistake Soulard might have made in calculating the area of his survey, which error could not have exceeded about seven acres, to about fourteen acres of accretions to Soulard's survey (as the patent plainly does, in order to account for the excess of 21.52 acres in survey No. 3333, over the area of land contained in Soulard's survey, according to his calculation), the east line of survey No. 3333, instead of being moved east to the River, to contain this larger quantity, would remain the same as Soulard's east line, notwithstanding it was located east of Soulard's original line for the express purpose of including these fourteen acres in U. S. Survey No. 3333, and that by no possibility could these fourteen acres be included in the latter survey without locating its east line east of Soulard's and on the river. How such a mistake could have occurred is inexplicable, as there is but one fourteen-acre tract (and that is of accretions to Soulard's survey) mentioned in the patent. It may have been that the Court mistook the sand beach, formed into accretions (which the patent states were then rapidly advancing) since survey No. 3333 was executed, for the fourteen acres. But this does not seem probable, as the former sand beach now formed into land contains over 94, instead of fourteen acres.

We do not deem it necessary to review the questions of an outstanding title in the Buchanan heirs, or of an adverse possession of the premises, as both of these not only failed of

proof, but were conclusively disproved, the latter by the defendant's evidence, and the former it is estopped from claiming by reason of having also claimed a dedication to it by plaintiff. The latter defense is utterly inconsistent with the first, and should not be permitted.

The answer in this case is a general denial, adverse possession and adverse user as a wharf, which are the same defenses, for the statutory period of ten years. This special plea added nothing to the general denial, as the defenses of adverse possession and an outstanding title could have been made under it, and the special plea might have been stricken out on motion of plaintiff without affecting their defense. But the rule under the Missouri practice, as we have seen by the case cited, is firmly established that in order to be available as a defense, estoppel must be specially pleaded in ejectment as well as other cases. In McCracken v. McCracken, 67 Mo. 590, 592, it was applied to the defense of advancements made to pretermitted heirs. We have seen, and shall not here repeat what has been said on the subject, that the evidence which it was claimed tended to prove estoppel *in pais* against plaintiff, were acts performed by other parties, without any authority shown from plaintiff to perform them or that she even knew of them, but which if done by her in person and specially pleaded herein, would have created no estoppel against her. This evidence should not have been admitted by the Circuit Court, against the objection of plaintiff's attorneys, but the verdict in the case renders the error harmless and there is no cause for complaint.

The agreement endorsed on the plat in regard to a division line between Mary L. Tyler and the Buchanan heirs, as we have seen, specifically extended their line to the River, and its tendency would have been to rebut a *prima facie case* of dedication on their part, and such would have been its tendency in favor of plaintiff, if such a case had been made against her. But defendant claims that plaintiff recognized the wharf by it. In view of City Ordinance No. 5403, establishing the

North wharf and authorizing its opening, which remains in force to day as a law of the city, plaintiff and all other persons were bound to so recognize it, and could not avoid so doing; but such recognition did not carry with it any presumption of an intention to dedicate the premises to the defendant, but the contrary presumption. In the case of Brooklyn Street, 118 Pa. St. 640, 646, affirmed, In re Wayne Avenue, 124 Pa. St. 135, 137, this precise question was before the Court, and it was held, that where a street had been established but unopened, and a party conveyed a lot bounded on it and described it in the conveyance as bounded by said street, that whatever effect this call for a boundary might have between the grantor and the grantee in the deed, it was not a dedication of such street by the grantor in the deed.

The foregoing in no manner conflicts with the case of Buschmann v. City, 121 Mo. 523, as the Court decided that the plaintiff in the latter case had made a statutory dedication of the wharf at that point, by a plat duly executed, acknowledged and recorded. The reference to the conveyances by Buschmann, in the latter part of the opinion are only incidental and the question here discussed was neither raised by counsel in the case nor discussed by the Court, nor has this question ever been raised and passed on in any Missouri case. In the case of White v. City, 153 Mo. 80, Ordinance 5403 is referred to, but its effect in rebutting an intention to make a dedication, was neither presented to nor discussed by the Court.

There are only five methods known to the law by which a dedication of property can be established. These are, 1, by a deed of conveyance; 2, by a statutory dedication; 3, by an implied covenant in a deed bounding the property conveyed by a street; 4, by adverse possession; and 5, by matter *in pais*, or strictly speaking estoppel. In the first two cases the right vests at once without formal acceptance or use; in the third case the courts differ as to when the right vests; in the fourth case the use must be for the full statutory period before the right vests. In the fifth case, where land is platted by the

owner and public streets &c., are marked on it, and there is either a formal acceptance, or use of the streets, &c., sufficient to show an acceptance, the right vests. While this method, strictly speaking, is a gift, by offer and acceptance, the courts generally treat it as an estoppel. It is clear that the present case does not come within any of the foregoing, and if defendant acquired any right in the premises in controversy, it must have been acquired by estoppel, in the strict sense of the term.

This question has been definitely settled in favor of plaintiff, in a case involving a portion of this north wharf. In 1853, some forty odd persons joined in what is commonly called the "Wharf Deed," conveying for a wharf, all of their interests in property lying on the River, between Cherry street and the north city limit or Dock street, the latter lying south of the premises in controversy so that said deed did not affect them; St. Louis v. Wiggins Ferry Co., 88 Mo. 615, 617; Hafner v. St. Louis, 161 Mo. 34, 39, 41.

Mary A. Pendleton, who joined in said "Wharf Deed," sued in ejectment and recovered possession of a portion of the land embraced in said "Wharf Deed," and sold it for a valuable consideration to a party who in turn sold it to the defendant, in the case of St. Louis v. Schulenberg & Boeckler Lumber Co., 98 Mo. 613. The defendant pleaded estoppel as one of its defenses. In disposing of this question the Court, p. 617, said:

"3. The claim of an estoppel *in pais* is equally untenable, the former judgment in favor of Mary A. Pendleton was rendered in 1877, and in 1881 the city commenced this suit to regain possession. In the meantime Pendleton sold the property to the grantors of the present defendant. The grantees supposed the former judgment was conclusive, but that was a mere mistake of the law on their part. It does not appear that the City in any way induced the defendant or its grantors to buy the property, nor does it appear that the City, by its proper officers, had any knowledge of the proposed purchase. The first element of an estoppel by conduct is, that

there must have been a false representation or a concealment of facts. Bigelow on Estoppel (3 Ed.), 484; and this element is wanting in the present case."

Applying this ruling to the present case, there is nothing in it remotely resembling an estoppel, for if any false representations were made in this matter, defendant made them. The matters relied on by defendant as such, if done by plaintiff in person, did not come within this principal. Moreover, the defendant did not use the premises in controversy or make any expenditure on them in any way, so as to make it inequitable or unjust for her to reclaim them. In fact, its act in leasing them out is a mere repetition of the threatened trespass, carried out in this case, so vigorously condemned as an attempt to despoil the owners, by Judge Wagner, in his opinion in Anderson v. St. Louis, 47 Mo. 479, 484-486. The ruling also applies to the railroad company, in building a track across them, if it were a party to this suit and might otherwise avail itself of these claims, whether it took adverse possession of the tract of its own motion, or under a license from defendant to build the track at a time when plaintiff had no control over these premises and no notice of its intended action.

In view of the facts that no use of the premises in controversy was ever made by defendant prior to the time it leased them out, for a lumber yard in 1891; that the use made of them by the general public prior to that time in navigating the Mississippi River, was in derogation of any claim to them as wharf by the defendant; that defendant expended nothing on them and did not change its situation in regard to them; that plaintiff's lots were laid out into City Blocks by defendant for its own convenience and purposes prior to the time that the premises in controversy were formed, and it made the assessments of her lots omitting these premises, and the tax bills that were paid on the property adjoining them, describing it as bounded east by the wharf, all of this time holding out to plaintiff, by ordinance, that it would condemn and pay for them; that in the meantime plaintiff had an actual possession

by her tenants on her lots and exercised the usual acts of ownership over them to the river, by caring for and driving trespassers off of them, it seems unnecessary to further discuss the facts disclosed by the record herein, as failing to show any intention on her part to dedicate them or estop her, and we shall not do so, especially as the verdict herein, which is thoroughly sustained by the evidence, conclusively negatives any such intention on her part or estoppel against her.

In conclusion we submit that the judgment of the Supreme Court of Missouri, reversing the judgment of the Circuit Court of the City of St. Louis, and rendering judgment for the defendant, is erroneous and should be reversed, and that the judgment of the latter court is correct and clearly for the right party, and should be affirmed.

All of which is respectfully submitted.

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